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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

APRIL 21, 1916—JULY 5, 1916

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OF THE

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 13218. Department Two. April 21, 1916.]

In the Matter of the Estate of RUSSEL M. BACON.[1]

WILLS—TESTAMENTARY CAPACITY—EXECUTION—EVIDENCE — SUFFICIENCY. Findings supporting the testamentary capacity and due execution of a will are sustained by a preponderance of the evidence, although there was an appearance of the separation of the sheets and the insertion of another, where the circumstance was fully explained and each sheet was signed at the foot by the testator.

Appeal from a judgment of the superior court for Lincoln county, Webster, J., entered March 25, 1915, sustaining the probate of a will, after a contest, tried on the merits to the court. Affirmed.

Mulligan & Bardsley, H. J. Hibschman, and *H. N. Martin,* for appellant.

Merritt, Lantry & Merritt and *John I. Melville,* for respondent.

PARKER, J.—The petitioner, Thomas Bacon, commenced this proceeding in the superior court for Lincoln county, contesting the validity of the will and the codicil thereto of his father, Russel M. Bacon, deceased, which had theretofore been duly probated in common form in that court. The grounds of contest relied upon by the petitioner are, in sub-

[1]Reported in 156 Pac. 845.

stance: (1) That, after the execution of the will, it was wrongfully changed by the removal of one of its sheets and the substitution of another therefor by someone other than the deceased, so that the will as probated was not the will of the deceased; (2) that the will was procured to be executed by deception and undue influence practiced upon the deceased; and (3) that the deceased was not of sound mind and was mentally incapable of making a will at the time of the purported execution of the will and codicil. At the conclusion of a somewhat protracted trial, the court sustained the will as probated and rendered judgment accordingly against the petitioner, from which he has appealed to this court.

There are no questions here presented calling for serious consideration other than questions of fact. The alleged wrongful change of the will after its execution is to be determined from circumstances which must be viewed in the light of oral testimony the credibility of which the trial court was much better able to judge than we are. Some facts appearing from the will itself, such as the manner in which its separate sheets were attached together, their appearance of having been separated and again attached together, and the difference in the typewriting on one sheet as compared with the others, are fully explained as having occurred before the execution of the will and during the course of its preparation, by the testimony of a credible witness which the trial court was warranted in believing, specially in view of the fact that the signature of the deceased appears at the foot of each separate sheet of the will. It is true that an expert handwriting witness, by his testimony, if it is to be believed, would render the signature of the deceased upon the alleged changed sheet doubtful; but other handwriting witnesses, who apparently are equally credible, if they are to be believed, render it practically certain that the signature was the signature of the deceased. This view, we think, is supported by a comparison of that signature with those upon the other sheets, including the one at the foot of the entire will, all of which are before

us and were before the trial court. It is also true that another witness testified to facts tending to show that this particular questioned sheet of the will was inserted after its execution in place of the one originally there. We think, however, in the light of all the circumstances, the trial court was fully warranted as regarding the memory of this witness not sufficiently certain to establish the change in the will claimed to have been made.

The alleged deception and undue influence practiced upon the deceased inducing him to make the will, and also the alleged want of mental capacity on the part of the deceased at the time of the execution of the will, we think the learned trial court was warranted in concluding as being wholly unsupported by the evidence.

We have read with much care all of the evidence as found in the abstracts thereof made by counsel, which are quite full; and have also read a considerable portion of the evidence as found in the statement of facts, especially that touching the alleged change in the will after its execution; and are convinced therefrom that it preponderates in support of the views of the learned trial court upon all the questions presented. We think it would be unprofitable to review the evidence in detail in this opinion.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MAIN, and BAUSMAN, JJ., concur.

[No. 13238. Department Two. April 21, 1916.]

GEORGE W. CHUTE, *Respondent*, v. ATTALIA LAND COMPANY, *Appellant*.[1]

PLEADING—ANSWER—ADMISSIONS — PARTIES — CAPACITY TO SUE — HUSBAND AND WIFE—COMMUNITY PROPERTY. In an action for damages for failure to supply the water for irrigation of lands alleged to be owned by the plaintiff, defendant's answer admitting plaintiff's ownership admits the right and capacity of the plaintiff to sue for the damages without joining his wife as a party plaintiff, although the lands may be community property.

WATERS AND WATER COURSES—IRRIGATION—CONTRACT — BREACH — ACTION FOR DAMAGES—INSTRUCTIONS. In an action for damages for failure to supply water for the irrigation of lands, in which the answer raised the issue that plaintiff's damage was due to his fault in failing to receive and properly care for the water delivered, instructions are proper and sufficient where they contain a brief and concise statement of the rights and duties of the parties, followed by a direction that defendant would not be liable if its performance was rendered reasonably impracticable by plaintiff's failure to receive and properly care for the water after notice to plaintiff that defendant was ready to furnish it, nor if the damage was due wholly to plaintiff's acts or failure to care for such water as was furnished; and it was not error to refuse a requested instruction merely amplifying unnecessarily the rights and duties of the parties with reference to the delivery and receipt of the water.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered June 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Affirmed.

Pedigo & Smith and *A. E. Gallagher*, for appellant.

Rader & Barker, for respondent.

HOLCOMB, J.—This appeal comes to us on a short bill of exceptions. The action was brought to recover damages alleged to be sustained by respondent to certain fruit trees, strawberry vines, grape vines, and nursery stock, growing on certain lands alleged in the complaint to be owned by re-

[1]Reported in 156 Pac. 849.

spondent, by reason of appellant's failure, during the irrigation season of 1914, to furnish respondent water therefor, as required, according to a contract to furnish water to the lands described, made between the predecessors in interest of respondent and appellant.

Respondent alleged in his complaint that he *is the owner* of the lands described, setting forth the description thereof as platted and of record in the office of the county auditor of Walla Walla county. This allegation is admitted by the answer. The answer also admits appellant's corporate capacity, and that it is the successor in interest of the Columbia Canal Company which made and entered into the contract with respondent's predecessor for the irrigation of the lands described, and to furnish the quantity of water alleged by appellant during each irrigation season. The further allegations of respondent's complaint are denied, and a further affirmative defense is pleaded, setting up the deed and water contract affecting the land and alleging that appellant has at all times been willing to furnish the water required in the manner provided in the deed, but that it has been impossible to do so on account of respondent's failure to receive and properly care for the same; and that, if any damage has been suffered by respondent, the same is due wholly to the acts, unconcern, and failure on the part of respondent to properly care for the water delivered and to cultivate his land in a good and husbandlike manner. Upon these issues, the case went to trial before a jury. Evidence was introduced for and on behalf of each party, and the jury returned a verdict in favor of respondent for $700.

I. It is first contended by appellant that the court erred in submitting the case to the jury, (a) because the complaint does not state facts sufficient to constitute a cause of action; (b) for want of evidence to support the respondent's ownership of the land in question; and (c) because the court was without jurisdiction over the subject-matter of the action. These grounds of error are all based upon the proposition

that, during the trial, it appeared that the lands were acquired by respondent after marriage to his present wife. It is urged that, when respondent testified that he was married to his then wife long before he bought this land, that fact in and of itself raised a presumption that the real estate was community property; that this presumption was not overcome and stands as a fact in this case, nothing to contradict the presumption that it was community realty being shown; that the husband or the wife alone cannot bring an action which affects the community real estate without the other spouse joining in the action as a party plaintiff, any more than a party can bring an action which affects the community real property without making the husband and wife both parties defendant; that this is jurisdictional. *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594, and *Lowndale v. Grays Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663, are cited to sustain this contention.

In *Parke v. Seattle* the action was one for damages for the unlawful taking of community real estate; and in *Lowndale v. Grays Harbor Boom Co.*, the action was one to recover possession of community real estate and for the rents and profits while dispossessed; and in both of those cases it was properly held that the wife was a necessary party. Other cases were cited, such as *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035, and *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268, to the effect that a wife is a necessary party defendant where an action is brought against community real estate *in rem*, and these cases are thought to be applicable. We do not so consider any of the cases. It is not necessary to extend or to limit the doctrine first announced in *Parke v. Seattle*, *supra*, for the reason that we consider here that the admission in the answer of the allegation of ownership of the real estate in the present tense as of December 31, 1914, the date of the verification of the complaint, as being an admission as of that date only, is sufficient to sustain the right of action in the husband. Its effect was not only to admit the

ownership of the the property as of that date, but to admit the right and capacity of the husband to sue for the damages alleged in the complaint.

II. It is urged that the court erred in refusing to give an instruction to the jury requested by appellant as follows:

"You are instructed it is the duty of the plaintiff whenever water is furnished him pursuant to his request to be at the point of delivery of such water when the same is delivered there by defendant, and to receive the water from the company and not to use any of such water elsewhere than on the land of the plaintiff and not to use more water than is necessary to irrigate plaintiff's said lands without waste, and if you find from the evidence that the plaintiff did not receive said water and permitted the same to run to waste upon lands elsewhere than on the lands of the plaintiff, then and in that event the defendant had a right to shut off such water, even though plaintiff had not up to that time received all the water plaintiff was entitled to receive during the irrigation season of 1914, and not to furnish any more water thereafter to plaintiff till the plaintiff requested defendant so to do or notified defendant that he needed water."

Instead thereof, the court instructed, and it is urged erroneously, as follows:

"By the pleadings in this case it is admitted that it was the duty of the defendant to furnish water during the irrigation season extending from April 15 to October 15 of each year and at least at the ratio of one cubic foot of water per second of time for each one hundred and sixty acres of land, when reasonably requested so to do by the plaintiff; so that if you find by a preponderance of the evidence that the defendant did not furnish water after being reasonably requested by the plaintiff so to do, not exceeding that quantity, and that by reason thereof the plaintiff suffered damages, the plaintiff is entitled to recover from the defendant such damages as he has suffered by reason of the failure of the defendant to furnish the water as provided for in the deed and as requested by him, in accordance with the rule laid down in another instruction. But if you find by a preponderance of the evidence that the defendant was ready and willing to furnish water as provided for in the deed when reasonably requested by the plain-

tiff, and that the defendant attempted to comply with the terms of the deed and the request of the plaintiff and it was rendered reasonably impracticable for it to do so by reason of plaintiff's failure to receive and properly care for the water after the plaintiff had been notified that the defendant was ready to furnish it, then the plaintiff would not be entitled to recover damages by reason of such failure, if any, on the part of defendant to furnish water."

Appellant argues that, under the instruction given, the duty of the plaintiff and the right of defendant are entirely left out, and that, instead, the court submitted to the jury the question of the rights of the defendant as provided for in the deed, by saying that, if they found defendant was ready and willing to furnish water "as provided for in the deed and at the request of plaintiff, and it was rendered reasonably impracticable for it to do so by reason of plaintiff's failure to receive and properly care for the water after the plaintiff had been notified that the defendant was ready to furnish it;" in other words, that it was left to the jury to determine the legal effect of the provisions of the deed.

We do not so understand the instruction. It seems to us to be a brief and concise statement of the rights and duties of the parties under the first part of the instruction, and the reference to the attempted compliance with the terms of the deed in the latter part of the instruction merely applies to the admitted provisions of the contract referred to in the first part of the instruction. In the instruction immediately following, the jury were further instructed that, in case they should find from the evidence that any damage suffered by the plaintiff was due wholly to the acts, unconcern, and failure of the plaintiff to care for such water as was furnished him by the defendant and the failure of the plaintiff, if there were such failure, to cultivate the lands involved in this action in a good and husbandlike manner, then their verdict would be for the defendant. Under all these instructions, we are satisfied that the jury were properly informed and instructed as

to the rights and duties of the parties in relation to each other. The requested instruction merely amplified unnecessarily the rights and duties of the parties with reference to delivery and receipt of the water.

We find no error. The judgment is affirmed.

MORRIS, C. J., MAIN, PARKER, and BAUSMAN, JJ., concur.

[No. 13310. *En Banc.* April 21, 1916.]

THE STATE OF WASHINGTON, *on the Relation of the State Capitol Commission, Petitioner*, v. ERNEST LISTER, *as Governor, et al., Respondents.*[1]

STATES—PUBLIC DEBT—POWER TO CONTRACT—INTEREST ON BONDS—STATUTES. Laws 1915, p. 700, § 3, of the act for bonding the capitol building lands for $1,500,000, the principal payable only from the capitol building fund derived from the sale of the lands, which provides for the levy of an annual tax sufficient to meet the interest on the bonds, the same to be deemed a loan from the general fund and repaid from the proceeds of sales or leases of capitol building lands, is unconstitutional as the creation of a "debt" for such interest charges, within the meaning of Const., art. 8, § 3, providing that no debts except as specified, shall hereafter be contracted on behalf of the state unless authorized by law for some specified object, which law shall provide ways and means, exclusive of loans, for the payment of interest on such debt as it falls due, and also to discharge the principal of such debt within twenty years, and shall be submitted to a vote of the people at a general election; since the interest is not payable from the same source as the principal, but is to be raised by an annual tax, in the "same manner as other state levies are made," in violation of the purpose of the constitution to prevent the taxpayers from being assessed therefor unless authorized by a vote of the people.

SAME. The proceeds of the capitol building lands cannot be considered as an asset equivalent to cash for the purpose of meeting such interest charge.

SAME. The bonding of the state capitol lands for the purpose of erecting buildings and creating a "debt" for interest charges, without submitting the same to a vote of the people, in violation of the

[1]Reported in 156 Pac. 858.

constitution, cannot be sustained on the principle authorizing municipal corporations to exceed their debt limit for the purpose of meeting necessary obligations, as the same is not applicable.

MORRIS, C. J., PARKER, and MOUNT, JJ., dissent.

Application filed in the supreme court January 29, 1916, for a writ of mandamus to compel a bond issue. Denied.

Ballinger, Battle, Hulbert & Shorts, for petitioner.

The Attorney General and *R. E. Campbell* and *Edward W. Allen, Assistants*, for respondents.

Davis & Neal, amici curiae.

MAIN, J.—This is an original application for a writ of mandate. The relator is the state capitol commission. The respondents are the governor of the state and the state auditor. The writ is sought for the purpose of compelling the governor and auditor to execute an issue of $1,500,000 of bonds which are authorized by ch. 191, Laws of 1915, p. 699, the sale of which is contracted for. The purpose of the proceeding is to determine the constitutionality of the act under which the bonds are issued.

The title of this act recites that it is an act relating to capitol buildings and grounds, the powers and duties of the state capitol commission, and the issuance of bonds for state capitol purposes, and providing for a tax levy for the payment of interest.

Section 1 of the act provides that the state capitol commission may, in its discretion, issue coupon or registered bonds of the state of Washington, payable only from the capitol building fund in an amount not exceeding $4,000,000, for the purpose of refunding the warrants outstanding against the capitol building fund, and interest accrued thereon, acquiring additional lands for a site, and erecting and completing buildings for the state capitol; that such bonds shall bear interest at a specified rate; that the state capitol commission may allow a brokerage commission of not to ex-

ceed one-fourth of one per cent on the bonds issued, which is to be paid from the proceeds of the sale of such bonds; that none of the proceeds from the sale of such bonds shall be used for erecting new buildings other than the Temple of Justice until the warrants outstanding against the capitol building fund have been paid or provided for.

Section 2 provides: That the bonds shall, under the provisions of the act, be in such denominations and be payable in such manner and at such times and places not longer than twenty years from date as shall be fixed by the state capitol commission; that the interest shall be paid thereon semiannually at such place or places as the commission shall prescribe; that such bonds shall be signed by the governor and state auditor, under the seal of the state, and any coupons attached to the bonds shall be signed by the same officers; that the bonds may be registered in the name of the holder on presentation to the state treasurer, or at the fiscal agency in the state of New York, as to principal alone, or as to both principal and interest, under such regulation as the state capitol commission may prescribe.

Section 3 of the act is as follows:

"The state capitol commission shall annually, at any meeting next preceding the annual meeting of the state board of equalization, report to such board the estimate of the amount of money necessary to pay all interest charges that may accrue during the ensuing year upon any of the obligations outstanding against the capitol building fund, and the state board of equalization is hereby authorized and required to levy a tax sufficient to raise such amount in the same manner that other state tax levies are made. All moneys thus raised shall constitute a special fund to be known as the capitol building interest fund. All expenditures made from the capitol building interest fund shall be deemed a loan from the general funds of the state, and shall be repaid to the general fund from the proceeds of the sales or leases of capitol building lands and the timber and materials thereon after all other claims against the capitol building funds shall have been paid." Laws 1915, p. 700, § 3.

Section 3 is quoted in full, because it is this section, taken in consideration with a provision of the constitution, which will presently be referred to, which is involved in this controversy. There are other provisions of the act; but those referred to are sufficient to show its general scope and purpose.

It should be noted that, by § 3, the state capitol commission is required, annually, at any meeting next preceding the annual meeting of the state board of equalization, to report to such board the estimate of the amount of money necessary to pay all interest charges that may accrue during the ensuing year upon any of the obligations outstanding against the capitol building fund; that the state board of equalization is required to levy a tax sufficient to raise such amount in the same manner that other state tax levies are made; that the moneys thus raised shall constitute a special fund to be known as the "capitol building interest fund;" that the expenditures made from the capitol building interest fund shall be deemed a loan from the general funds of the state, and shall be repaid to the general fund from the proceeds of the sales or leases of capitol building lands.

According to the terms of this act, the principal of the bonds issued thereunder is payable "only from the capitol building fund;" and the interest charges are to be met by the levy of a tax in the same manner as other state taxes are levied. There is no provision in the act, however, making or attempting to make an appropriation out of this capitol building interest fund to the payment of such interest. The proposed issue of bonds involved here, as already stated, is for the sum of $1,500,000, and bears interest at the rate of four and one-half per cent per annum, payable semiannually.

Sections 1, 2, and 3 of art. 8, of the constitution, are these:

"Sec. 1. The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dol-

lars ($400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

"Sec. 2. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and to no other purpose whatever.

"Sec. 3. Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people."

In *State Capitol Commission v. State Board of Finance*, 74 Wash. 15, 132 Pac. 861, it was held, construing an act (ch. 59, p. 319, Laws of 1911, as amended by ch. 50, p. 139, Laws of 1913; 3 Rem. & Bal. Code, § 6704-1 *et seq.*) relative to the bonding of state capitol lands, and providing that the state should guarantee the principal and interest thereon, that such act did not come within either § 1 or § 2 of art. 8 of the constitution. This is recognized in the present case, and it is not claimed here that either of those sections apply.

It is, however, claimed that the provisions of the act of 1915 which authorizes the levy of a tax for the purpose of paying the interest is not prohibited by § 3 of the constitu-

tion. This section, it will be observed, provides that "no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof." The section further provides that, before such law can take effect, it must be "submitted to the people and have received a majority of all the votes cast for and against it" at a general election. The bond issue in contemplation has not been submitted to the people for their approval or rejection. If, then, the provisions of § 3 of the statute relative to the payment of the interest upon the bonds creates a debt, within the contemplation of § 3 of the constitution above quoted, the bonds cannot be legally issued.

Constitutions being the result of the popular will, the words used therein are to be understood ordinarily in the sense that such words convey to the popular mind. The meaning to be given to the language used in such instruments is that meaning which a man of ordinary prudence and average intelligence and information would give. Generally speaking, the meaning given to words by the learned and technical is not to be given to words appearing in a constitution. *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039; *Epping v. Columbus*, 117 Ga. 203, 43 S. E. 803; Cooley, Constitutional Limitations, p. 92; 1 Story, Constitution, § 451, p. 345; Black, Constitutional Law, p. 79. Other authorities might be cited in support of this rule of construction, but it is so generally recognized that further citation of authority hardly seems necessary.

According to the terms of the act, both the bonds and the coupons are to be signed by the governor and the state auditor, and the seal of the state attached. When these obligations are issued, they become contracts, the bonds calling for pay-

ment only out of the capitol building fund, and the interest coupons calling for payment out of the capitol building interest fund to be created under the act.

Turning, then, to the word "debt" in the constitution: Does it apply to the interest upon the bonds in question which is evidenced by the coupons attached. This interest becomes due at times and in amounts definite and certain. The plain purpose of providing in the constitution that "no debts shall hereafter be contracted" was to prevent the taxpayers of the state from being called upon to meet obligations which had not been authorized by a vote of the people.

Our attention has been directed to a number of authorities holding that the interest to accrue upon municipal bonds is not to be taken into consideration in determining whether such municipality has exceeded its debt limit. And this is the general rule relative to such corporations, though there are some decisions to the contrary. The constitutional provision relative to municipal corporations is a limitation upon the amount of the indebtedness, and not a prohibition against any indebtedness, as is § 3 of the constitution above quoted. This distinction in the two constitutional provisions is recognized in *State Capitol Commission v. State Board of Finance, supra.* We think it will be found, in the cases involving municipal indebtedness, that the principal of the bonds and the interest were payable out of the same fund or from the same source, and that the interest which was to accrue was looked upon as only an incident, or a future accumulation against which the present limitation of indebtedness might not apply. The principal of the bonds here sought to be sustained is not payable out of the same fund, or from the same source, that the interest is payable from. So far as the question presented in this case is concerned, the interest alone must be looked upon as the "work or object" to be accomplished. It would hardly be contended that unaccrued interest, which was due in a certain amount and at a definite time, evidenced by a formal written document, was not a debt in a certain sense.

The constitution says "no debts shall hereafter be contracted." Whether the municipal rule would be applied to state obligations, if the principal and interest were payable out of the same fund, we need not now inquire. The act disassociates the two and puts each in a class by itself. With this disassociation, we think the interest coupons must be held to evidence a debt, within the meaning of the constitution.

If the interest upon these bonds is not to be held a debt, then the door opens, notwithstanding the constitutional provision, for the legislature to bond the lands of the state which are set apart for the various public institutions, and require the interest thereon to be paid by general taxation. There would hardly be any limit to the amount of the bonds that could be issued and the extent to which taxes might be exacted in payment of the interest that would accrue. It may be said that this is a remote contingency. But it is not a question whether it is a result probable or improbable; but it is a question whether the constitution permits or would permit such expenditures. Support is given to this position by the provisions of the act itself, wherein it is provided that the state board of equalization is "required to levy a tax each year sufficient to meet the interest payments upon the bonds." If the interest is not a present obligation of the state, and therefore not a debt, it would seem that it would not be necessary to provide in the act that an annual tax be levied for that purpose. If the coupons are not evidence of an indebtedness until they become due, surely the state could be trusted to not default in the payment of its obligations as they may accrue from time to time.

It is probably true that the money coming into the capitol building interest fund could not be applied in payment of the interest coupons until it was so appropriated by the legislature; but it may be asserted, with dogmatic certainty, that, if the bonds and coupons should be issued, at no time would the legislature refuse to make an appropriation for the purpose of meeting the matured interest coupons. Refusing to make

the appropriation would be equivalent to repudiation of the obligation. Such a position on the part of the state is unthinkable. This, however, is beside the question. It is not what the legislature would or would not do; but can the debt be created and the money collected from the taxpayers of the state without the people being heard upon the question when the constitution gives them this right. The act upon its face bears unmistakable evidence of a studied effort to circumvent the constitution. To hold that the interest coupons issued under the provisions of the act are not evidence of a debt, within the meaning of the constitution, would be to give judicial approval to a subterfuge.

The cases of *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107; *Scott v. Tacoma*, 81 Wash. 178, 142 Pac. 467; *Seymour v. Ellensburg*, 81 Wash. 365, 142 Pac. 875, do not meet the situation here presented. In those cases, it was held that, when money is transferred from the general fund of a municipality to a special fund, which special fund had an assured income the collection of which was under the control of the city, such loans do not imperil the general fund and will not be considered in determining the indebtedness of the city. In those cases, there was a legal certainty that the sum loaned from the general fund would be repaid out of the special fund which had a source of income other and different from that of the general fund. In this case, the source of the income of the capitol building interest fund and the general funds of the state are the same. Both are derived from taxation. The special interest fund is to be raised in the "same manner that other state levies are made." If the moneys that may come into the capitol building interest fund from the sale or leases of state capitol lands is the source looked to for reimbursement, then the answer is that, in the case of *State Capitol Commission v. State Board of Finance, supra*, it was held that the state capitol lands could not be considered as an asset of the state equivalent to cash.

Neither is the rule which permits municipal corporations to exceed their debt limit for the purpose of meeting obligations which are made mandatory upon the municipality by the constitution and the laws of the state, or such as are necessary to maintain their corporate existence, here applicable.

We will not review the numerous cases brought to our attention by the industry of counsel. In a painstaking examination of the authorities cited in the briefs, we have found no case in point upon the issue here presented. Indeed, as we understand the briefs, it is not claimed that any of the authorities therein cited are exactly in point; but they are cited more by the way of argument than as deciding the precise question.

The writ will be denied.

HOLCOMB, ELLIS, FULLERTON, BAUSMAN, and CHADWICK, JJ., concur.

PARKER, J. (dissenting)—I do not think that the act of 1915 (Laws 1915, ch. 191, p. 699) here in question is so clearly unconstitutional as to warrant the court in so holding. As I read its provisions, they do not irrevocably pledge the general credit of the state to the payment of the interest on the bonds for the issuance of which it provides. It is true, the act does authorize the levy of a tax annually to pay the interest on the bonds, but I do not see in its terms any pledge that the state will continue to do so and not repeal that provision of the act. Future legislatures may feel morally obligated to make appropriations for the payment of such interest from the general fund, as every legislature since the year 1901 has made appropriations from the general fund for the payment of interest upon the capitol building fund warrants, though not legally bound to do so; but this act, I think, contains no pledge that it will not be repealed in that particular or that such appropriations will be made. I am of the opinion that the act should not be held unconstitutional,

and therefore dissent from the views of my brethren as expressed in the foregoing opinion.

It may be that the form of the bonds as proposed to be issued by resolution of the state capitol commission, the execution of which by the governor and auditor would be a mere ministerial act, do in terms pledge the general credit of the state to the payment of the interest thereon. If the bonds proposed to be issued are susceptible of this construction, I concede that they ought to be changed so as to not pledge the general credit of the state; since, as I read the act, that is not authorized by its terms. This, however, is a mere minor matter of detail and becomes of no consequence in the light of the decision of the majority holding the act unconstitutional.

MOUNT, J., concurs with PARKER, J.

MORRIS, C. J. (dissenting)—I join in the views of Judge Parker; but the chief reason for my dissent is that the provision of the act to annually levy a tax in an amount equal to the interest to accrue upon the bonds and to place such money in the capitol building interest fund does not constitute the contracting of a debt. It therefore seems to me that the issuance of these proposed bonds is in no sense a debt against the state, nor is the credit of the state loaned in violation of any constitutional provision. For these reasons, I dissent.

[No. 12955. Department Two. April 25, 1916.]

JULIA A. POINTS *et al.*, *Appellants*, v. W. S. NIER, *as Executor etc., et al., Respondents.*[1]

WITNESSES—PRIVILEGE—WAIVER—PHYSICIANS AS WITNESS TO WILL. The testatrix's attending physician who attests the will is not excluded from testifying as to its execution and the testamentary capacity of the testatrix by Rem. & Bal. Code, § 1214, which provides that a physician shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending his patient which was necessary to enable him to prescribe or act for the patient; as the privilege is waived by requesting the attestation.

WILLS—EXECUTION AND ATTESTATION—EVIDENCE—SUFFICIENCY. The evidence shows due execution and attestation of a will where it appears that the testatrix, being too feeble to subscribe her name, was assisted in making her mark, stated that she understood it, and the witnesses attested it in her presence and in the presence of each other, upon a request to do so made in her presence; a signature by mark being sufficient, and a request being inferred from the circumstances, where another makes the request in her presence.

WILLS—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A finding of testamentary capacity, upon conflicting evidence will be sustained where there was but one witness against the validity of the will, who was contradicted by two attending physicians who acted as attesting witnesses, although the mental condition of the testatrix was doubtful and suspicious and the will was in the sole custody of her husband and chief beneficiary, there being no circumstances preponderating against the finding of the lower court.

Appeal from a judgment of the superior court for Stevens county, Sessions, J., entered December 30, 1914, upon findings in favor of the defendants, sustaining the probate of a will, after a contest tried to the court on the merits. Affirmed.

Carey & Johnson, for appellants.

Jesseph & Bourland, for respondents.

HOLCOMB, J.—Mary Sousanna Nier, the deceased, died at the Colville Sanitarium, in Colville, Washington, on April 27,

[1]Reported in 157 Pac. 44.

1914. On April 26, 1914, she made what is purported to be her last will and testament. In this instrument, she willed all her property, real and personal, to her husband, W. S. Nier, excepting a small amount of wearing apparel, which was given to her niece, La Rena Miller, of Belgrade, Montana. On May 11, 1914, the purported will was admitted to probate and letters testamentary issued to W. S. Nier as executor. The deceased left property in Stevens and Spokane counties, of the total value, as inventoried and appraised, of $18,450. She had been married to W. S. Nier about two years prior to her death. All of her property was separate property. She had been married twice before her marriage to Nier, but had no children, and left surviving her, as her only heirs at law, Julia A. Points and Lucy Elizabeth Cannon, sisters, and her husband. Her husband was named as executor in the will.

The sisters of deceased contest the will on the grounds that (1) the testatrix did not subscribe or sign her name or mark to the purported will, nor did she request or authorize any one to subscribe or sign her name or mark to it; (2) that, if any person did sign the name or mark of the testatrix to the will, such person did not subscribe or sign his or her name to the will as a witness thereto; (3) that L. B. Harvey and S. E. Rosenthal did not subscribe their names as witnesses to the purported will at the request of the testatrix or in her presence; (4) that, at the time of the purported signing of the will by testatrix, she had reached a point of mental dissolution in consequence of surgical operations and long and intense suffering and pain, and by reason thereof was mentally and physically incapacitated to make or sign a will or to make any testamentary disposition of her property, or to understand or comprehend the terms of the will, which was prepared by her husband for her to sign; (5) that, at the time of the purported signing of the will by testatrix, her husband did, by force, fraudulent representations, undue influence and other means, attempt to cause her to sign the pur-

ported will but failed in his attempt; (6) that, thereafter, Nier took the will into his possession and did fraudulently mutilate, deface, and change the markings and names in the purported will; (7) that, at all times during the two years' time previous to the death of the testatrix, during her married life with W. S. Nier, he supplied her with intoxicating liquors and drugs, excluded friends from visiting at her home, and neglected to provide her with medical treatment and other necessary care, all for the purpose of undermining her constitution and shortening her natural life, with the ultimate object in view of obtaining her property. The court, after hearing the evidence, sustained the will.

I. It is first contended by appellants that the testimony of the witnesses Harvey and Rosenthal should have been excluded on the ground that their testimony was incompetent and privileged, because they were the physicians who attended deceased during her last illness. These witnesses testified, not only to the execution of the will by the testatrix, but also to the sanity of deceased and her mental competency to execute a will. Appellants quote the provisions of our statute, Rem. & Bal. Code, § 1214 (P. C. 81 § 1033), which reads as follows:

"A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient."

Cases are cited to the effect that, under such statutes as this, it is held that the privilege is personal with the patient, and that it applies in testamentary cases and cannot be waived by the heirs and personal representatives. We do not agree with the reasoning or the holding of the cases cited. 4 Wigmore, Evidence, § 2390, states the rule as follows:

"To request a physician to *attest one's will* is by implication to request him to bear testimony, if called on, to all facts affecting the validity of the will, and is therefore a waiver."

The same rule is stated by Wigmore as to privilege by attorneys in such cases. With reference to the privilege of attorneys in such cases, 4 Jones, Evidence, § 756, says:

"The privilege is waived, also, if the client requests the attorney to be a subscribing *witness to a will*, as this leaves the witness free to perform the duties of the position, and to testify to any matters in relation to the will and its execution of which he acquired knowledge, including the mental condition of the testator."

Rood, Wills, § 317, says:

"The person who signs the will for the testator, and the one who acts as his counsel and scrivener in drafting it, are competent as subscribing witnesses. When the testator assents to his spiritual, medical, or legal adviser subscribing as a witness to his will, he thereby waives his privilege of secrecy and confidence as to that matter, and authorizes and expects such adviser to testify to it."

See, also, *Blackburn v. Crawfords*, 3 Wall. 175; *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. 202. Our opinion is, therefore, that, if the testatrix requested these physicians to attest her will as witnesses or knowingly assented thereto, she waived the privilege, and they are competent to testify as to the execution of the will and the competency of the maker.

The further question arises, however, as to whether or not she did in fact request these witnesses to attest her will, or knowingly assented thereto. The evidence shows that there were present, at the time of the proposed execution of the will, these two doctors, the matron of the hospital, Lilian Erickson, the testatrix, and W. S. Nier. The matron of the hospital had been nursing the testatrix during all her sickness in the hospital. The hospital belonged to Doctors Harvey and Rosenthal. The nurse testified as follows:

"One of the doctors called me in the room and told me to bring in pen and ink, which I did. The will was already unfolded and ready to sign. Mr. Nier, Doctors Harvey

and Rosenthal were present and Dr. Rosenthal told the testatrix to sign the will. I placed the pen in her hand, Mr. Nier said to the testatrix, 'You aren't signing anything away from you.' The testatrix attempted to sign her name but she was unable to sign it. Dr. Rosenthal told me to sign her name and make an 'X' out at the edge of the name, and I wrote the words 'Mary Sousanna Nier.' I then placed my left hand under her elbow and my right hand upon her hand and assisted her in making a cross. There was a cross made but I cannot remember whether it was made in a straggling condition or not. I do not remember anything about the letters 'M,' 'r,' and 's' in the word 'Mrs.' I was in the room all the time the will was being executed. While I was in the room, Mrs. Nier spoke no word or made no statements or request whatever. Mrs. Nier was suffering a great deal and we thought she might pass away at any time. At the time of the execution of the will and for about four days' time before her death Mrs. Nier was sinking and was irrational. At the time of the signing of the will Mrs. Nier was irrational and was not in a condition to transact business or to make a will. When the will was being signed, she knew something was going on there for she looked at it. I did not see either Dr. Harvey or Dr. Rosenthal sign the will. Dr. Harvey said after the signing of the will that they would do no signing that day as it was a legal holiday [Sunday]. I remember that she spoke to me on the morning of the day the will was signed, but I do not remember what she said to me nor do I remember what I said to her. What she said was at times rational and at times it was not. Mrs. Nier was unable to sign the will because of weakness. She always knew me. She knew me to the very last. I don't know if she recognized me the morning she died or not, but she always knew me because I was around her so much; I just lived in there mostly. I talked with Mrs. Nier the morning the will was signed, and, as a rule, I talked every morning. I base my judgment that she was not capable of transacting business upon the fact that she was getting worse and I had come to feel that she could not recover."

Dr. Harvey testified that he performed the operation upon Mrs. Nier and that her condition mentally, as far as he knew at that time, was the same as any other individual.

"She did not show any indication of mental decay or derangement. That was before and at the time of the operation. After the operation, she seemed to improve for eight or ten days, and then gradually faded away. I saw her from one to three times a day,—that is, in twenty-four hours. She was receiving a regular course of treatment from Dr. Rosenthal and I. I think she did understand and could understand what she was doing and the purport and intent of the instrument. It must have been nine or ten o'clock in the morning on Sunday, April 26, 1914, when the will was signed. The nurse did all the writing. When Mrs. Nier started to write her name she got trembly and I think it was Dr. Rosenthal suggested to let the nurse write her name and have her make her mark. Mrs. Nier having died at about ten o'clock on the 27th day of April, 1914, and this will having been made after nine o'clock on Sunday morning the previous day or the 26th of April, Mrs. Nier's mind was not in a state of dissolution at the time of making the will; not any more than any other patient in the weakened condition she was. Mental dissolution is where the mind is simply weakened by the diseased condition of the physical make-up. She talked some at the time the will was made, but I could not tell you a word she uttered. She was able to talk. I thought she was in a state of mind at the time this purported will was made to consider all of her property and relatives and her duties toward them, and she was not able to sign her name simply on account of her weakened condition and nervous condition she was in. I don't know whether she could have continued to write the name or not. I think some people may be in such a weakened condition as to be unable to sign their name to a will and still be capable of making a testamentary disposition of their property and some of them might not be. Each case is a law unto itself under those circumstances."

He further testified that, after the will was signed by mark by Mrs. Nier, he and Dr. Rosenthal signed it as witnesses in her presence and in the presence of each other. Dr. Rosenthal, the other attending physician and subscribing witness, testified, in brief, as follows:

"I saw her nearly every day and when seeing her I talked with her. Her mind appeared to be normal. Of course, she

was in pain but, as far as I could see, she was rational, if that is what you mean. When we went into the room Mr. Nier had the will and requested us to witness Mrs. Nier's signature and before doing that Mr. Nier read the will, and we asked the patient if she understood the purport and if she wished to sign the will, and she answered in the affirmative. After the will was read to Mrs.. Nier and after I asked her if that was what she wanted and if she understood it, she simply said, 'Yes,' and that was all. In my judgment Mrs. Nier was capable of understanding and was rational at the time she did this. In fact, the question of her being rational or not never entered my mind throughout the whole case because that was not one of the conditions of which I was thinking. I took it for granted all the time that she was rational. There was nothing to make me suppose that she was not."

He further testified that, after she signed the will by mark, he and Dr. Harvey signed it as witnesses in her presence and in the presence of each other.

II. A consideration of the foregoing testimony covers the contention of the appellants that the testatrix did not subscribe, sign, or authorize her signature of the name or mark to the purported will; that, if any person did sign her name or the mark of the testatrix to the instrument, such person did not subscribe as a witness thereto, and that the subscribing witnesses Harvey and Rosenthal did not subscribe their names at the request of the testatrix or in her presence.

Appellants cite the statute, Rem. & Bal. Code, § 1321 (P. C. 409 § 31), reading as follows:

"Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request."

The evidence here is, however, that the testatrix signed her name by mark, and if she was competent to cause that to be done, the fact that it was done with assistance would make it her signature. That a last will and testament can

be signed by a mark, is universally established. It is immaterial that her name was also signed thereto by another. A signature by mark differs from an authorized signature by another. 40 Cyc. 1102; Rood, Wills, § 254; *Succession of Bradford* (124 La. 44, 49 South. 972), 18 Ann. Cases, 766, and notes; *Wilson v. Craig*, 86 Wash. 465, 150 Pac. 1179; Schouler, Wills (3d ed.), § 309; *In re Kearney's Will*, 69 App. Div. 481, 74 N. Y. Supp. 1045.

"The request that witnesses should attest and subscribe one's will may be inferred from acts and conduct of the testator as well as his express words; the law regarding substance rather than literal form in such matters. It is not essential, therefore, that the testator should expressly ask the subscribing witnesses to attest his will. His acts, his gestures, may signify this request; whatever, in fact, implies his knowledge and free assent thereto. Indeed, the active part in procuring the witnesses and requesting them to attest and subscribe is not infrequently borne by some friend, near relative or professional counsel; and if such third person acts truly for the testator in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business." Schouler, Wills (3d ed.), § 329.

III. The third and most serious contention by appellants is that, at the time of the execution of the purported will, the testatrix was not of sound and disposing mind and memory and had no testamentary capacity. This question is one that depends entirely upon the facts and circumstances shown as existing at the time. It is true that the nurse, whose testimony seems to be exceedingly disinterested and reliable, testified that Mrs. Nier had been irrational for a period of three or four days before the will was presented to her; that is, she thought she was. But she testified, also, that she talked with Mrs. Nier the morning the will was signed, and it is shown that the will was signed quite early in the morning. She based her judgment on the capacity of the deceased to transact business upon the fact that she

was getting worse and the nurse had come to feel that she could not recover. Against her testimony, there is the testimony of the two subscribing witnesses, and of the wife of one of them, who was about the hospital and the testatrix very frequently, that, at and about that time, the mind of the testatrix was rational. The opinion of this writer is that the mental condition of the testatrix was, to say the least, doubtful and suspicious; and the fact that the will was in the sole custody of her husband and the chief beneficiary of the will, who apparently himself caused its preparation by the attorney who drew it, although the testatrix had several months previously spoken to the attorney about preparing *a will*, and the fact that the husband, just before the execution of the will, stated to the testatrix that she "was not signing anything away"; and the fact that it was found necessary to cause the will to be signed by mark because she was unable from some reason to sign it herself, are all suspicious. But suspicion, however great, is not sufficient to nullify it. This court has laid down the rule in the case of *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385, quoting from Redfield on Wills, as to what the quantum of mental capacity to make a will is, as follows:

"The result of the best considered cases upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction, or, in popular phrase, that the testator should at the time of executing the will know and understand what he was about."

We hold the view that the right to dispose of one's property by will is one assured by the law and is a valuable incident to ownership, and does not depend upon its judicious use. *In re McDevitt*, 95 Cal. 17, 30 Pac. 101. As to proof of the competency of the maker, it is stated in 14 Ency. of Evidence, p. 369:

"The testimony of attending physicians is entitled to great and peculiar weight. It may overcome the testimony

of lay witnesses if based on personal observation and knowledge, or that of experts based on hypothetical questions; but not that of an uncontradicted witness as to what testator actually did in connection with the preparation of the will, or that afforded by proof of success in business matters."

In the same work, page 390, it is said:

"It is the function of subscribing witnesses to inspect and judge the mental condition of the testator before they sign the will. It is presumed that such witnesses performed their duty. The fact may be inquired into on their cross-examination. Hence, peculiar weight is given their testimony if it is in accordance with their attestation, and it is often disparaged if it differs therefrom."

The trial court, having had the benefit of seeing and judging of the demeanor, as well as hearing and weighing the testimony, of all the witnesses in this matter, found in favor of the competency of the testatrix. Without some circumstances or evidence preponderating against that testimony and the finding of the court thereon, we cannot overturn it. There are not sufficient circumstances or evidence against the same in this case, and we do not feel warranted in reversing the judgment and nullifying the will.

V. As to the allegations that there was fraudulent misrepresentation, coercion, or undue influence used upon the testatrix to procure the execution of this will, and that there was mutilation and defacement of it after its execution, there is no sufficient testimony to support them.

The judgment of the superior court is, therefore, affirmed.

MORRIS, C. J., PARKER, and CHADWICK, JJ., concur.

[No. 12799. Department One. April 28, 1916.]

ISABEL WILSON, *Administratrix, Appellant*, v. FRANK KORTE *et al., Respondents.*[1]

VENDOR AND PURCHASER—CONTRACT—ABSTRACT SHOWING TITLE—CONSTRUCTION—DEFECTS CURED BY TAX TITLE. Since a contract calling for a warranty deed conveying good title, as shown by a complete abstract of title, only calls for a marketable title or one reasonably free from reasonable doubt, an abstract showing an independent title by the foreclosure of a general tax lien cures prior defects in the chain of title, including an ancient unreleased mortgage, where the statute of limitations has run against setting the tax title aside; in view of Rem. & Bal. Code, § 9230, making a general tax lien superior to all other liens, and Id., § 162, starting the running of the statute of limitations against the same.

SAME—CONTRACTS—ABSTRACT—DEFECTS — UNPAID TAXES. A vendor's contract to convey free and clear of all incumbrances is not breached by the existence of unpaid taxes prior to the delivery of the deed, which was not forthcoming until the full purchase price was paid, since they were then removable; nor where the parties submitted the title to adjudication and the taxes were paid before the trial.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 7, 1914, upon findings in favor of the defendants, in an action on contract. Reversed.

P. F. Quinn, for appellant.

John H. Pelletier, for respondents.

CHADWICK, J.—Plaintiff's decedent, A. V. Wilson, contracted to sell to the defendant certain lots in the town of Medical Lake, Washington. The contract price was $450. One hundred dollars was paid in cash. The balance was to be paid annually in sums of $100, $100, and $150. The

[1]Reported in 157 Pac. 47.

contract provided that upon full payment of the contract price, the vendor would

". . . deliver a warranty deed, conveying good title free from all encumbrances as shown by a complete abstract of title certified by a responsible abstractor to be furnished by Wilson on or before 10 days and to be examined by the said purchaser within 10 days thereafter. If said abstract does not show such title, or cannot be made to do so within 10 days from notice of defects, then this agreement to be void and all payments hereunder shall be refunded."

The first deferred installment was not paid by the vendee. This action was brought to recover the amount due. A. V. Wilson died pending the hearing of this appeal, and his administratrix has been substituted as appellant. It appears that, after the first payment had been made and defendant had gone into possession of the property, an abstract was furnished. Various objections were made, among others, as follows:

"There is nothing in the abstract to show whether an administrator was appointed for the estate of Nancy Ann Bishop, wife of W. H. Bishop.

"There is nothing in the abstract to show whether Percy W. Bishop and Fanny E. Bishop are the only heirs at law of Nancy Ann Bishop, deceased wife of W. H. Bishop.

"There is nothing to show that A. G. Bishop was regularly appointed guardian of the persons and estate of Percy G. and Fanny E. Bishop, minors.

"There is no release of the mortgage of Albert Burkhart to Gus Ereckson for $100.00, given December 3rd, 1888, on lot 22, block 3, Bishop's addition, recorded in Book T of Mortgages at page 280.

"There is nothing to show whether W. H. Bishop on January 18, 1881, was married or a widower or divorced when he gave a warranty deed to James Benton for lots 22 and 23 in block 3 of Bishop's Addition.

"In warranty deed from W. H. Bishop to James N. Glover dated March 16, 1885, for lots 20 and 21 in block 3 of Bishop's Addition Victor R. Bishop signs as wife of W. H. Bishop and there is nothing to show whether Nancy Ann Bishop was his wife at that time or dead or divorced.

"The taxes for the year 1912 and 1913 amounting respectively to $6.00 and $10.74 are also unpaid."

The plaintiff replied, asserting that title was good; the defense being that the lapse of time had cured all of the objections that had been made other than the payment of the taxes for 1912 and 1913, and that these had been paid pending the suit. Plaintiff further set up, and it is admitted as a fact, that certificates of delinquency had been issued by the county of Spokane for the taxes of 1890 and 1891; that the county had maintained a foreclosure proceeding; that plaintiff had become the purchaser at the sale; that the county had executed a good and sufficient deed; and that plaintiff was in possession at the time, and had maintained possession until he had put defendant in possession under the contract.

Neither the abstract nor a transcript of the tax proceeding, in so far as it affects the property which is the subject of this controversy, has been made a part of the record. We assume that the abstract will show the admitted facts, and have to inquire only as to the proper legal conclusion. We do not find it necessary to decide whether an abstract showing a defect cured by the statute of limitations, or by adverse possession, meets the call of the contract to convey by "a warranty deed, conveying good title free from all incumbrances as shown by a complete abstract of title certified by a responsible abstractor;" for we assume that the abstract shows a sufficient tax foreclosure proceeding and a title independent of a title which would ordinarily come within the definition of a title deducible of record. Under any aspect of the case, all that respondents can demand is a marketable title. The definition of a marketable title in most common use is that it is a title reasonably free of reasonable doubt. This definition was adopted by this court in *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, 132 Am. St. 986. See, also, *Somers Co. v. Pix*, 75 Wash. 233, 134 Pac. 932, and

cases cited. In the earlier case of *Hoffman v. Titlow*, 48 Wash. 80, 92 Pac. 888, the court held that a stipulation for a complete abstract of title, entitled the purchaser to demand "a title free from hostile claims and possible litigation."

Real estate is a thing peculiarily subject to barter and sale and a title may not be captiously rejected. All objections must be considered in the light of existing law and such legal inferences as may be drawn from the facts as disclosed by the abstract. *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506; Maupin, Marketable Title to Real Estate, p. 707, § 283.

This means no more than that a purchaser will not be compelled to accept a title which is dependent upon parol evidence. This court has had frequent occasion to declare the legal effect of a tax deed.

"By the provisions of Rem. & Bal. Code, § 9230 (P. C. 501 § 205), the lien of general taxes is declared to be superior to all other liens and claims upon the property against which such taxes are charged. The regular foreclosure of such a lien as was concededly had against this lot has, under our revenue law, all the force of a proceeding *in rem*. (*Continental Distributing Co. v. Smith*, 74 Wash. 10, 132 Pac. 631), and vests in a purchaser at a sale held under such foreclosure a new title independent of all previous titles or claims of title to the property. *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927. Manifestly, both record and possessory titles are equally absolutely destroyed by such a foreclosure. Such is the theory upon which the following decisions of this court were rendered, though they involved only the question of superiority of general tax liens over local assessment liens. *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68; *Keene v. Seattle*, 31 Wash. 202, 71 Pac. 769; *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, 101 Am. St. 993; *Pennsylvania Co. v. Tacoma*, 36 Wash. 656, 79 Pac. 306; Black, Tax Titles (2d ed.), § 420. Clearly, adverse possession prior to the creation of a tax title lends not the least support to the title claimed thereafter." *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194.

We have also had occasion to construe § 162 of the code, holding that a tax deed sufficient in form will start the running of the statute and that it cannot be set aside after the time fixed by the statute. *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. 921; *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 166 Pac. 1082; *Fish v. Fear*, 64 Wash. 414, 116 Pac. 1083. The tax deed evidencing a new and independent title operates as a grant from the state and bars all inquiry as to the objections we have noted, as well as the objection that the abstract shows an ancient unreleased mortgage.

We have not overlooked the contention that the taxes for the years 1911 and 1912 were not paid at the time the abstract was delivered; but they were removable defects, and they were removed before the trial. But granting that they were incumbrances and, if allowed to remain, would operate as a breach of the vendor's covenant, the question is not material for two reasons; first, appellant was not bound to remove them prior to the delivery of his deed which was not forthcoming until the full purchase price was paid; and second, the parties, by their pleadings and proofs, have subjected the questioned title to this court for final adjudication. Respondent being in possession, the case presents all the elements of a case of specific performance or of rescission.

Reversed, with directions to enter a decree in favor of appellant.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13018. Department One. April 28, 1916.]

LOUIS MEYER *et al.*, *Appellants*, v. ROBERT T. HODGE, *as Sheriff of King County, et al.*, *Respondents*.[1]

SALES—CONTRACT—RESALE—CONSTRUCTION. A sale of goods authorizing the buyer to "return the goods" to the sellers and obtain credit contemplates a resale requiring delivery to pass title; and the title does not pass by delivery to a local transfer company for reshipment to the sellers at Chicago, in the absence of any bill of lading or notice and acceptance; since the carrier was the buyer's agent and the goods were subject to his control, and liable to attachment.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 2, 1915, in favor of the defendants, upon stipulated facts, in an action of claim and delivery, tried to the court. Affirmed.

Leopold M. Stern (*Harry J. Myerson* and *Don C. Wray*, of counsel), for appellants.

Robert W. Waite, for respondents.

MOUNT, J.—This action was brought by the plaintiffs, claiming to be the owners of certain goods levied upon by the sheriff of King county. Judgment was rendered in favor of the defendants below. The plaintiffs have appealed.

The facts are stipulated in substance as follows: The plaintiffs are engaged in business at Chicago, Illinois. On November 15, 1914, they sold to Dave Wein, at Seattle, Washington, certain woolen goods, of the value of $616.24. At the time of this sale, it was agreed that "Mr. Wein could at any time return the goods and obtain new styles, or return the goods and obtain credit therefor. If he did not return them, he was charged with them. No part of this shipment has been returned, and no part has been paid for."

[1]Reported in 157 Pac. 42.

Thereafter Mr. Wein sold a portion of the goods. On January 9, 1915, Mr. Wein called at the office of the Seattle Taxicab & Transfer Company, a corporation engaged in business as a common carrier and transfer company at and within the city of Seattle, and requested that company to call at his place of business at about the hour of 11:30 at night for a package. Thereafter, at the time designated, the transfer company caused one of its trucks to call at Mr. Wein's place of business, and it received a box addressed to the appellants at Chicago, Illinois. Mr. Wein instructed the transfer company to ship the box to the address named thereon. It was then too late to deliver the goods to a carrier to be transported to Chicago, and the box was stored in the warehouse of the transfer company.

On the next day, which was Sunday, Mr. Wein sent a telegram to the appellants, as follows: "I have sent goods back, and will send check for balance as soon as I can get it. Mail on way explaining matters." Thereafter on Monday morning, January 11, 1915, S. S. Jacobson brought an action against Mr. Wein, and caused a writ of attachment to be issued out of the superior court in due form, and upon the same day the sheriff levied upon the box of woolen goods, and took possession thereof. Thereupon the taxicab company wrote a letter to the appellants at Chicago, as follows:

"We beg to say that on Saturday, January 9th, Mr. D. Wein called at our office and requested us to call at 817, 3d Ave., Seattle, at 11:30 p. m. and secure a box of woolens which was to be held in our warehouse until Monday, when the said box was to be forwarded to you by freight. However, on Monday morning we were served with a writ of attachment by the sheriff of King county in favor of S. S. Jacobson to secure the said Mr. Jacobson for the sum of $551.46. The sheriff of King county has taken possession of this property today, January 11th. We are giving you the circumstances in connection with this case so that you may take whatever action you may think necessary. An acknowledgment of this letter will be appreciated. Very truly yours, Seattle Taxicab & Transfer Co."

Thereafter, the appellants made a claim of ownership to the property, gave a bond, and took possession of the goods from the sheriff. The value of the goods in controversy is conceded to be $225. The appellants, up to the time of taking possession of the goods from the sheriff, did not know what goods were shipped to them, nor the description, amount, or value thereof, other than as stated in the telegram hereinabove quoted.

Upon these facts, the trial court concluded that there had been no delivery of the goods by Mr. Wein to the appellants, and therefore rendered a judgment in favor of the sheriff for the value of the goods. This appeal followed.

The sole question in the case is whether there was a delivery of the goods by Mr. Wein to the appellants. It will be noted that, at the time the appellants sold the goods to Mr. Wein, there was an agreement that Mr. Wein could at any time return the goods and obtain new styles, or obtain credit therefor. It is conceded that he sold part of the goods. It was not stated that delivery might be made at Seattle to a common carrier. If such an agreement had been made, then delivery of the goods to a carrier would be a sufficient delivery to the appellants. But where the agreement is to "return the goods," it was incumbent upon Mr. Wein to return the goods to the appellants at Chicago.

"In order to pass the title to goods as against the seller or those claiming under him there must be a valid, existing and completed contract of sale. Under a completed contract of sale the property in the goods passes at once from the seller to the buyer, at the place where the contract becomes complete, and for this reason the agreement is frequently called an executed contract. The sale is, however, an executory contract, if the seller merely promises to transfer the property at some future day, or the agreement contemplates the performance of some act or condition necessary to complete the transfer. Under such a contract until the act is performed or the condition fulfilled which is necessary to con-

vert the executory into an executed contract, no title passes to the buyer as against the seller or persons claiming under him." 35 Cyc. 274.

There can be no doubt that the attempted return of the goods by Mr. Wein to the appellants was a resale of the goods by Mr. Wein to the appellants. *Whiting Mfg. Co. v. Gephart*, 6 Wash. 615, 34 Pac. 161. The delivery of the goods by Mr. Wein to the taxicab company was for the purpose of shipment to Chicago. It is conceded that the taxicab company is a common carrier and transfer company at and within the city of Seattle. This company was merely a local carrier within the city of Seattle. Delivery of the goods to it for shipment to Chicago did not constitute it the agent of the appellants. This carrier was simply the agent of Mr. Wein, who might at any time before the goods were shipped, retake them from the taxicab company. The agreement between the appellants and Mr. Wein was that Mr. Wein might at any time return the goods and obtain credit therefor. The intent of this agreement was that the goods might be returned to Chicago. This being true, there was no delivery of the goods by Mr. Wein to the appellants until the goods were delivered to them at Chicago.

The appellants rely upon the case of *Brown v. Bowe*, 35 Hun (N. Y.) 488. That was a case where goods were delivered to a railway company, and a bill of lading was issued therefor and sent to the consignee. The invoice and bill of lading were received by the consignee on November 10, 1880, who thereupon entered the merchandise set forth in the invoice as stock on hand to arrive. After that time, on November 13, 1880, an attachment was issued and the goods were seized and taken from the railway company. That case is clearly distinguishable from this by reason of the fact that there the consignee had received an invoice with a bill of lading, had accepted the same, and given the consignor credit therefor. In short, in that case, there had been a de-

livery and acceptance of the goods by the consignee. While in this case, there had been neither delivery nor acceptance by the consignee; no bill of lading had been issued; no invoice of the goods had been sent by the consignor; and the appellants did not know what goods were being returned, or their value. They simply knew that a part of the goods then in the possession of Mr. Wein were being returned to them, and nothing further. We think it is apparent that the facts in that case are entirely dissimilar to the facts in this case.

We are satisfied upon the statement of agreed facts that there was neither an actual nor constructive delivery to the appellants. The title to the goods therefore remained in Mr. Wein; and they were subject to attachment in an action against him.

The judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 13224. Department Two. April 28, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Clyde H. Williams, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.[1]

PARTIES—INTERVENTION—COMMON LAW. There being no right of intervention at common law, its existence in an action at law depends upon statute.

PARTIES—INTERVENTION—RIGHT TO INTERVENE—"INTEREST IN LITIGATION"—STATUTES. In an action at law for a balance due on railroad construction work, brought by an assignee of the contract against the principal contractor and the railroad company, the plaintiff's subcontractor for part of the work under a different contract with plaintiff, to which the defendants were not parties, is not entitled to intervene, under Rem. & Bal. Code, § 202, authorizing intervention by any person who has an interest in the matter in litigation, in the success of either party, or an interest against both, and providing that an intervention takes place when a third person is permitted to become a party by joining in the claims of either party or demanding anything adversely to both; since the interest must be such that the intervener will either gain or lose by the direct legal operation of the judgment, and not merely that of a contract creditor of the plaintiff without privity with defendants, whose only interest is in the creation of a greater fund from which to realize upon his claim against the plaintiff.

MORRIS, C. J., and HOLCOMB, J., dissent.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered December 11, 1915, in an action on contract, dismissing a complaint in intervention, upon sustaining a demurrer thereto. Affirmed.

P. W. Kimball, for relator.

Wakefield & Witherspoon, *Bogle*, *Graves*, *Merritt & Bogle*, and *Preston & Thorgrimson*, for respondent Rice & Company *et al.*

A. M. Craven and *W. T. Beck*, for respondent Kettle Valley Railway Company.

[1]Reported in 157 Pac. 28.

MAIN, J.—This case is here for the purpose of reviewing a judgment of the superior court dismissing a complaint in intervention. The facts are these: On June 29, 1911, the Kettle Valley Railway Company, a corporation, contracted with L. M. Rice & Company, a corporation, for the construction of forty-one miles of railroad. Rice & Company took this contract, not only for the benefit of itself, but for the benefit of Boomer & Hughes and Grant Smith & Company. In referring to these parties, the name of Rice & Company alone will be used.

The contract covered all the work of grading the right of way, erecting trestles, and otherwise preparing the roadbed for the rails. The work was to be paid for at certain unit prices specified in the contract, and was to be done according to the plans and specifications prepared by the railroad company. The engineer of the railroad company was made the arbitrator to determine disputes, and his decision was to be final and conclusive upon the parties.

On October 14, 1911, Rice & Company assigned or sublet the contract, excepting a small portion of the clearing, to Cross, Duffy & Heckman. The contract between Rice & Company and the railroad company was made a part of this contract. Cross, Duffy & Heckman were to receive the entire compensation paid by the railroad company, less seven and one-half per cent.

On March 15, 1912, Cross, Duffy & Heckman entered into a written contract with Clyde H. Williams for a certain portion, five miles in length, of the work. In this contract, the unit prices were not the same as in the contract of the railroad company with Rice & Company. Neither did this contract refer to that contract and make it a part thereof. The work was to be done according to plans and specifications of the railroad company, and the engineer of that company was to make the classification and decide all questions arising from or growing out of the agreement, and his decision was final

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PARTIES—INTERVENTION—RIGHT TO INTERVENE—"INTEREST IN LITIGATION"—STATUTES. In an action at law for a balance due on railroad construction work, brought by an assignee of the contract against the principal contractor and the railroad company, the plaintiff's subcontractor for part of the work under a different contract with plaintiff, to which the defendants were not parties, is not entitled to intervene, under Rem. & Bal. Code, § 202, authorizing intervention by any person who has an interest in the matter in litigation, in the success of either party, or an interest against both, and providing that an intervention takes place when a third person is permitted to become a party by joining in the claims of either party or demanding anything adversely to both; since the interest must be such that the intervener will either gain or lose by the direct legal operation of the judgment, and not merely that of a contract creditor of the plaintiff without privity with defendants, whose only interest is in the creation of a greater fund from which to realize upon his claim against the plaintiff.

MORRIS, C. J., and HOLCOMB, J., dissent.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered December 11, 1915, in an action on contract, dismissing a complaint in intervention, upon sustaining a demurrer thereto. Affirmed.

P. W. Kimball, for relator.

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The contract covered all the work of grading the right of way, erecting trestles, and otherwise preparing the roadbed for the rails. The work was to be paid for at certain unit prices specified in the contract, and was to be done according to the plans and specifications prepared by the railroad company. The engineer of the railroad company was made the arbitrator to determine disputes, and his decision was to be final and conclusive upon the parties.

On October 14, 1911, Rice & Company assigned or sublet the contract, excepting a small portion of the clearing, to Cross, Duffy & Heckman. The contract between Rice & Company and the railroad company was made a part of this contract. Cross, Duffy & Heckman were to receive the entire compensation paid by the railroad company, less seven and one-half per cent.

On March 15, 1912, Cross, Duffy & Heckman entered into a written contract with Clyde H. Williams for a certain portion, five miles in length, of the work. In this contract, the unit prices were not the same as in the contract of the railroad company with Rice & Company. Neither did this contract refer to that contract and make it a part thereof. The work was to be done according to plans and specifications of the railroad company, and the engineer of that company was to make the classification and decide all questions arising from or growing out of the agreement, and his decision was final

and conclusive between the parties. Neither the railroad company nor Rice & Company were parties to this contract.

On or about the 24th day of November, 1914, after the work covered by the contract of the railroad company with Rice & Company which was subsequently assigned to Cross, Duffy & Heckman had been completed, Cross, Duffy & Heckman brought an action against Rice & Company and the railroad company claiming a large balance to be due upon the contract. This balance, as alleged in the complaint, was made up of items for underestimates, erroneous classification, extra expense caused by alteration of the plans, and other similar items. After this action had been instituted, Williams, upon an *ex parte* application, filed his complaint in intervention, in which he claimed that, under his contract with Cross, Duffy & Heckman, there was a balance due him in the sum of $67,000 from both the plaintiffs and the defendants in that action. In the complaint in intervention, the items for which recovery was sought were erroneous classification and a small amount of extra work. Subsequently a second amended complaint in intervention was filed. To this complaint, a demurrer was interposed and sustained. Whereupon a judgment was entered dismissing the second amended complaint in intervention.

The question here for determination is whether the judgment dismissing the second amended complaint in intervention was erroneous. The action in which the intervention was sought was purely a law action. At common law, in such an action there was no right of intervention. Where the right exists, it must be by reason of a statute. Rem. & Bal. Code, § 202 (P. C. 81 § 47), provides:

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is

sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by a complaint setting forth the grounds upon which the intervention rests, filed by leave of the court or judge on the *ex parte* motion of the party desiring to intervene."

This statute was borrowed from the state of California. Code of Civil Proc., Kerr's Suppl., 1906-1909, § 387. A like or similar statute exists in a number of other states. The rule by which it is to be determined whether a person has a right to intervene under the provisions of the statute was stated by Mr. Justice Field in *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, as follows:

"The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment."

The construction of the statute, as made in that case, has been adopted and approved in, *Hindman v. Colvin*, 47 Wash. 382, 92 Pac. 139; *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913 B. 636; *Smith v. Gale*, 144 U. S. 509; *McClurg v. State Bindery Co.*, 3 S. D. 362, 53 N. W. 428, 44 Am. St. 799; *Harlan v. Eureka Mining Co.*, 10 Nev. 92.

Mr. Pomeroy, in the third edition of his work on Code Remedies, after reviewing a number of representative cases, in § 430, states the test by which it is to be determined whether a person has such an interest in litigation pending between other parties as will entitle him to intervene, as follows:

"The intervenor's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought

against him as the defendant, he would have been able to defeat the recovery in part at least."

The rule being that the interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment, it remains to inquire whether the intervener here is within the rule. The intervener being a mere subcontractor under Cross, Duffy & Heckman, there was no privity of contract between him and the defendants in the action, and he therefore could not maintain an action against such defendants. *McCarthy v. Kirksley*, 70 Ark. 444, 69 S. W. 53; *Richmond R. & Elec. Co. v. Harris* (Va.), 32 S. E. 458; *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 South. 295.

The intervener was not a lien creditor, but his rights were based upon his contract with Cross, Duffy & Heckman, the plaintiffs in the action. In a sense, at least, he was a contract creditor of the plaintiffs. He was interested in the litigation in common with the plaintiffs to the extent that, if the plaintiffs prevailed, a larger fund would exist out of which he might realize upon any judgment he might obtain against them upon his contract.

A creditor has not such a direct interest in the litigation that he has a right to intervene for the purpose of resisting the recovery by the plaintiff when, if such recovery were successfully resisted, there would be a larger fund in the hands of the defendant out of which he might realize upon his claim. *Hindman v. Colvin*, 47 Wash. 382, 92 Pac. 139; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 49 N. W. 1100. If a creditor has not such an interest in the litigation as will entitle him to intervene and resist recovery by the plaintiff because, if such defense be successful, a greater fund would exist out of which he could realize upon his claim against the defendant, it would seem to follow that a contract creditor of the plaintiff does not have such an interest in the litiga-

tion as would entitle him to intervene for the purpose of assisting in the recovery against the defendant, and thereby enhance the fund in the hands of the plaintiff out of which the intervener's claim could be realized.

The intervener will neither suffer loss nor gain by the direct legal operation and effect of whatever the judgment may be in the action between the original parties. If the plaintiff lose in that action, the intervener still has a right to sue the plaintiffs upon his contract. If the plaintiff prevail in that action, the intervener's rights upon his claim against the plaintiff are not affected. His rights are upon a contract with the plaintiff alone. He has no rights growing out of any contract with the defendants; there is no contractual relation between him and the defendants.

The intervener, in support of his claim of a right to intervene, cites the cases of *Muhlenberg v. Tacoma*, 25 Wash. 36, 64 Pac. 925; *Taylor v. Adair*, 22 Iowa 279; *Stich v. Dickinson*, 38 Cal. 608; *Coffey v. Greenfield*, 55 Cal. 382; *Morey v. Lett*, 18 Colo. 128, 31 Pac. 857. All of these cases, with one exception, are easily distinguishable from the case now under consideration. In the *Muhlenberg* case, the question at issue was the validity of certain city warrants. The intervener claimed to own the warrants and thus had a direct interest in the matter in litigation. In the *Taylor* case, the action was upon a promissory note, and the intervener, as executor for a deceased person, claimed that the note was the property of the estate. In the *Stich* case, the action was upon a promissory note and the intervener claimed to be the rightful owner thereof. In the *Morey* case, it was said:

"The privity between Lett [intervener] and Harvey [principal defendant] in the contract is fully established."

It thus appears that, in those cases, the intervener was either asserting title to the subject-matter in litigation, or the relation of privity existed. In the present case, the inter-

vener has no right or title to the subject-matter in litigation between the plaintiffs and the defendants. Neither is there any privity between him and the defendants. His only right is a judgment against the plaintiffs for any balance that may be due upon his contract with them.

The *Coffey* case, it must be admitted, is not so easily distinguishable as the other cases mentioned. In that case, the intervener was the holder of a sheriff's certificate of purchase, derived through the foreclosure of a mortgage. The plaintiff brought the action against the defendant attempting to establish that the defendant had held the title to the property covered by the mortgage in trust for the plaintiff. The right of the intervener was there sustained, because the intervener was interested in the success of the defendant in that action, and because he had an interest in the subject-matter in litigation. It was there said that he was interested in the success of the defendant because the judgment would determine all claims of the plaintiffs to the property, and render the intervener's title, if he obtained a deed from the sheriff, as against them, indisputable. The intervener there was interested in the subject-matter of the litigation by virtue of his mortgage upon the property. It had been foreclosed and merged into the sheriff's certificate of purchase. Had the decision rested alone upon the intervener's interest in the subject-matter of the litigation, it doubtless would have been within the rule above stated by which the right of intervention is to be determined. But the holding that the right of intervention existed because of his interest in the success of the defendant in the litigation, would hardly bring the case within the rule. In the opinion the previous holdings from the same court are not referred to. Neither is any reference made to the decisions of other courts construing like or similar statutes. Even though that case may not be distinguishable, wherein it holds that the intervener was interested in the success of the defendant in the action, and thus had a right to intervene, we do not think it should

be given controlling force and thus modify the well settled rule as established by the adjudications of the courts of a number of states where a like or similar statute exists. In the case now before us, the intervener did not have a direct interest in the success of either party, or an interest against both, or in the subject-matter in litigation between the plaintiffs and the defendants, such that he would suffer gain or loss by the direct legal operation and effect of any judgment that might be rendered in that action between the original parties; and, hence, under the rule, did not have the right to intervene.

The judgment will be affirmed.

PARKER and BAUSMAN, JJ., concur.

HOLCOMB, J. (dissenting)—It seems plain to me, upon the allegations of the amended complaint, (1) that relator has an immediate and substantial interest, as privy of contract to all the parties, in the subject-matter of the litigation in the principal case; (2) that he is most likely to suffer loss if the defendants prevail; (3) that he is certain to gain if the plaintiffs succeed therein and proportionately with the degree or amount of the success of plaintiff; (4) that the intervention would avoid a multiplicity of suits involving the rights of the parties; and (5), that the intervention would work no harm to the railroad company or Rice & Company, or Cross, Duffy & Heckman, other than as justice would demand.

It seems obvious to me that the case falls squarely within the statute of intervention and the rule enunciated in Pomeroy's Code Remedies, § 430, and as applied in *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569.

The judgment should be reversed and the right of intervention granted. Therefore, I dissent.

MORRIS, C. J., concurs with HOLCOMB, J.

[No. 13145. *En Banc.* April 29, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Joseph Lopas et al., Respondents,* v. HENRY SHAGREN *et al., Appellants.*[1]

COUNTIES—OFFICERS—COUNTY OR STATE—GAME COMMISSION AND WARDENS—STATUTES. The fact that the game code of 1913 (3 Rem. & Bal. Code, § 5395-1 *et seq.*) refers in the title and body of the act to "county game commissions" and "county game warden," does not necessarily make them county officers, within Const., art. 11, § 5, requiring the legislature to provide for the election of county officers; and in view of the fact that they are appointed by and under the supervision of state officers, and may be transferred on official business "from one county to another," the legislature must have intended to make them state and not county officers.

GAME—OFFICERS—COUNTY OR STATE—COMMISSIONS AND WARDENS—STATUTES. The functions of the county game commissions and county game wardens, being the protection and propagation of game birds, animals and fish, the title to which is in the state and the protection of which is within the police power of the state, and their functions not relating exclusively to matters of local concern, the county game commissions and wardens are state and not county officers, within Const., art. 11, § 5, requiring the legislature to provide for the election of county officers; hence the game code (3 Rem. & Bal. Code, § 5395-2) providing for their appointment is constitutional.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 8, 1915, in favor of the plaintiff, in mandamus proceedings, tried to the court. Affirmed.

Walter B. Whitcomb, for appellants.

The Attorney General and *Edward W. Allen, Assistant*, for respondents.

MAIN, J.—This action was instituted in the superior court for the purpose of securing a writ of mandate, directed to the board of county commissioners, requiring that board to

[1]Reported in 157 Pac. 31.

audit and allow a claim against the county game fund. The relators were the members of the county game commission in their representative capacity, and the owner of the claim. The trial resulted in a judgment directing that the writ of mandate issue. From this judgment, the appeal is prosecuted.

The controlling question is whether the members of the county game commission and the county game warden are county officers, under the game code, Laws of 1913, ch. 120, p. 356 (3 Rem. & Bal. Code, § 5395-1 *et seq.*).

The county game commission and the county game warden are not elective, but are appointive officers. The constitution, art. 11, § 5, requires that the legislature shall, by general and uniform laws, provide for the election in the several counties of the state of certain specified officers, "and other county . . . officers, as public convenience may require, and shall prescribe their duties and fix their term of office." Among the specified officers, a game commission or a game warden is not mentioned, and if such officers are county officers, it is by reason of the fact that the legislature has created such offices.

It will first be necessary to look into the game code to ascertain from its provisions whether the legislature had in mind the creation of county offices when they provided for the county game commission and the county game warden; and if it shall appear that it was not the legislative intent to make these offices county offices, then the inquiry must be directed to the question whether the functions that such officers perform are county or state functions.

Giving attention to the first question, it will be noted that the title of the act refers to "county game commissioners," and "the office of county game wardens." Section 1 (Id., § 5395-1) of the act provides that a county game commission "is hereby created." This commission consists of three residents of each county. Running through the other sections of the act, and more particularly in § 2 (Id., § 5395-2),

there are frequent references to the "county game commission," and the "county game warden." While the commission is referred to as a "county" game commission and the warden as a "county" game warden, it does not necessarily follow from this terminology that the offices are county offices. The phraseology may only refer to the geographical limits within which the duties of the offices are to be exercised, and not to the nature or grade of the office. *Leib v. Commonwealth*, 9 Watts (Pa.) 200; *State ex rel. Buchanan County v. Imel*, 242 Mo. 293, 146 S. W. 783; *State ex rel. Ward v. Romero*, 17 N. M. 88, 125 Pac. 617. In the case first cited, though not speaking with reference to a game commission or a game warden, but with reference to another office, though the principle is the same, it was said:

"It is also true that the constitution and laws, in speaking of the courts of Common Pleas, term them at different times the Courts of Common Pleas 'in each county,' 'of each county,' and 'within each county.' But the phraseology seems to refer to the geographical limit within which the duties of each are to be exercised, and not the nature or grade of the office."

The mere fact, then, that the game commission is referred to as the county game commission, and the game warden as the county game warden, does not necessarily make the officers holding such positions county officers. To determine whether the legislature intended that they should be county officers, it is necessary to look further into the act.

Section 2 (Id., § 5395-2) of the act provides for a chief game warden and a chief deputy game warden, to be appointed by the governor. These officers are unquestionably state officers. The game commissioners in the counties west of the Cascade mountains are to be appointed by the chief game warden; and those east of the mountains by the chief deputy game warden. These appointments are to be made upon the recommendation of the county commissioners of each county; but in case the county commissioners fail to recommend game

commissioners for appointment upon the request of the state game wardens within ten days after written notice so to do, then and in that case, the chief game warden may appoint in counties west of the Cascade mountains, and the chief deputy may appoint for counties east of the mountains. The game commission in each county appoints a county game warden and fixes his salary, to be paid "solely out of the money received from county game licenses and fines." This section also provides that the state game warden and the chief deputy game warden, "shall have general supervision and control of the county game wardens and county deputy wardens, and may transfer them on official business from one county to another whenever in their judgment it is advisable so to do."

Section 3 (Id., § 5395-3) of the act requires the county game wardens to report to the state wardens, and provides that "the chief game warden and the chief deputy game warden, the game commissions and the county wardens shall have jurisdiction to enforce all of the laws of the state relating to game birds, game animals and game fish."

From these references to the statute, it will be seen that the members of the county game commission are appointed by state officers, and that the state game wardens have supervision and control over the county game wardens, and may transfer them on official business "from one county to another." The act fixes no term for the county game commissioners, or for the county game wardens. There being no term fixed in the act for such officers, the power to remove may be exercised by the appointing power at pleasure.

In Throop on Public Officers, § 304, it is said:

"Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."

There are provisions in the act other than those mentioned which would seem to indicate that it was the legislative intent to create county offices. There are also provisions in

the act not referred to which would lend support to the view that it was not the intention of the legislature to create county offices. When all the terms of the act are considered, it seems reasonably plain to us that the legislature did not intend that the game commissioners and the game wardens of the various counties should be county officers. The legislature must have had in mind the constitutional provision requiring county officers to be elected, and it is reasonable to presume that it did not intend to violate this provision of the constitution. The fact that the state game wardens have the power to appoint and the power to remove and the right to transfer the county game wardens from one county to another, would indicate that the legislative thought was that the offices created by the act were not county offices.

The next inquiry is whether the functions to be performed by the county game commissions and the county game wardens are county functions. If the functions of these offices relate exclusively to the local concerns of particular counties, then they are county offices, notwithstanding the legislature may have entertained a contrary intention. But if the functions of the offices created by the act concern the state at large or the general public, although exercised within definite territorial limits, they are not county offices. *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; 1 Dillon, Municipal Corporations (5th ed.), § 97. In the text of Dillon cited, the distinction between state officers and county or municipal officers is thus pointed out:

"And here it is important to bear in mind the before-mentioned distinction between *state* officers—that is, officers whose duties concern the state at large, or the general public although exercised within defined territorial limits—and *municipal* officers, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confined to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of local gas-works, of local water

works, the construction of local sewers, and the like, are matters which ordinarily pertain to the municipality as distinguished from the state at large."

The functions of the game commissions and the game wardens, as provided in the code, are the protection and propagation of game birds, game animals, and game fish. Is, then, the protection and propagation of game birds, game animals, and game fish a county function?

It is the settled doctrine in this state that title to all game belongs to the state in its sovereign capacity, and that the state holds this title in trust for the use and benefit of the people of the state. The state, through its legislature, has the right to control, for the common good, the killing, taking, and use of game. *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938; *Graves v. Dunlap*, 87 Wash. 648, 152 Pac. 532.

In the *Cawsey* case, it was said:

"Under the common law of England all property right in animals *ferae naturae* was in the sovereign for the use and benefit of the people. The killing, taking and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the Federal constitution."

In the exercise of its police power, the state has the right to protect and control the game birds, game animals, and game fish within its borders. In *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805, it was said:

"The police power is indispensable to any commonwealth, and . . . the right of regulating fish and game is a proper exertion of such a right."

Since the title to all game is in the state for the benefit of the people of the state, and the state has the right in the exercise of its police power to protect and cause to be prop-

agated, and to regulate the killing of such game, it would seem to follow that officers whose functions are the protection and propagation of game birds, game animals, and game fish, are not county officers. The functions of these officers do not relate to matters exclusively of local concern of the particular county, but do concern the general public, or the state at large.

It must be understood that the legislature, had it seen fit to do so, could have imposed upon the counties of the state, as the agencies thereof, the duty of protecting game within the respective counties, and have provided that the counties should elect and pay officers for this purpose. *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639.

A considerable discussion appears in the briefs over the question whether the county game commission and the county game wardens are exclusively state officers, or joint state and county officers or agents. But we find it unnecessary to determine this question for the reason that we are clearly of the opinion that such officers are not county officers within the constitutional provision mentioned.

The appellant cites, in support of the contention that the game commission and the county game warden are county officers, the cases of *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708; *State ex rel. Snodgrass v. Savage*, 47 Wash. 701, 92 Pac. 409, and *State ex rel. Armstrong v. Halliday*, 61 Ohio St. 171, 55 N. E. 175.

In the *Blumberg* case, it was held that the horticultural act, which was there under consideration, was unconstitutional, because it attempted to create the office of county fruit inspector, and did not make that office elective. But the terms of the horticultural act were materially different from those of the present game code. There, the term of office was fixed at two years, the salary of the officer at $4 per day, and the appointment was to be made by the county commissioners. The legislature in the act there under consideration, as shown by the terms of the act, had created a county office.

In the present case, we have found that the opposite intention prevailed.

In the *Savage* case, it was held that the act of the legislature, as found in the Laws of 1905, p. 349 (Rem. & Bal. Code, § 5322), which provides for the appointment of a game warden by the county commissioners, was unconstitutional. The game act there under consideration was similar in its provisions to the horticultural act in the *Blumberg* case, and without discussion, the decision in the *Savage* case is rested upon that in the *Blumberg* case.

In the *Halliday* case, it was held that a statute in Ohio which provided for the appointment of a fish and game warden in each county, was void, because such offices were county offices under the provisions of the statute there under consideration. The statute before the Ohio court was similar in its provisions to that of the horticultural act in the *Blumberg* case, and the game act in the *Savage* case.

The judgment will be affirmed.

MORRIS, C. J., MOUNT, PARKER, FULLERTON, ELLIS, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 12965. *En Banc.* April 29, 1916.]

THE STATE OF WASHINGTON, *on the Relation of A. J. Beach, Respondent,* v. ANDREW OLSEN *et al., Appellants.*[1]

COUNTIES—CLAIMS—PRESENTATION — SALARY OF GAME WARDEN — STATUTES. Claims for the salary of county game wardens must be presented to the county commissioners, under 3 Rem. & Bal. Code, § 5395-34, providing that all payments made under the game code shall be audited as are other claims against the county, and 2 Id., § 3918, providing that the county auditor shall audit all claims against the county and present the same to the county commissioners for allowance.

SAME—CLAIMS AGAINST GAME FUND—POWERS OF COUNTY COMMISSIONERS—STATUTES. The game code (3 Rem. & Bal. Code, §§ 5395-2, 5395-34) having provided that the county game commission shall fix the salary of game wardens and pass upon the propriety of expenditures, the county commissioners, in the allowance of claims against the county game fund, cannot determine the salary or the propriety of the expenditures, but act in an administrative or ministerial capacity with the right only to reject illegal claims.

MANDAMUS—WHEN LIES—TO COUNTY BOARDS—ISSUANCE OF WARRANTS. Mandamus lies to compel the issuance of county warrants against the county game fund in payment of the salary and expenditures of game wardens.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered May 3, 1915, in favor of the plaintiff, in mandamus proceedings, tried to the court. Reversed.

F. W. Moore, for appellants.

The Attorney General and *Edward W. Allen, Assistant,* (*Bryan & Colvin,* of counsel), for respondent.

MAIN, J.—This is a companion case to that of *State ex rel. Lopas v. Shagren, ante* p. 48, 157 Pac. 31. The principal question here presented is discussed and decided in that case. There are two or three minor questions, however, in this case, which are not covered in the other opinion.

[1]Reported in 157 Pac. 34.

In this case, the claims involved are the salary of the county game warden for the month of March, 1915, for $100 and for $32.80 which was expended by the game warden in the performance of the duties of his office. The trial court entered a judgment in which the county auditor was directed to issue warrants for these claims. The judgment also ordered that the county commissioners desist from in any manner interfering with the issuance of any warrants by the county auditor, and also desist from considering any claims for salary or otherwise which might be presented by the county game warden.

The first question is whether the claims for salary of the county game warden and the moneys expended by him in the performance of the duties of his office should be presented to the board of county commissioners for examination and allowance. In § 34 of the game code, Laws of 1913, ch. 120, p. 372, it is provided that:

"All payments made under the provisions of this act shall be made by warrant in the usual manner, and shall be audited by the . . . county officers in the same manner as other claims against the . . . various counties are audited." 3 Rem. & Bal. Code, § 5395-34.

By this provision of the game code, all claims are to be audited in the same manner as other claims against the various counties. The manner of auditing claims presented against the various counties is found in Rem. & Bal. Code, § 3918 (P. C. 115 § 115), wherein it is provided that:

"He [the county auditor] shall audit all claims, demands and accounts against the county which by law are chargeable to said county . . . Such claims as it is his duty to audit shall be presented to the board of county commissioners for their examination and allowance. . . ."

It will be noticed that, by this statute, it is the duty of the auditor to audit claims and then present them to the board of county commissioners for their "examination and allowance."

If the salary of the game warden and his expenses are to be audited in the same manner as other claims against the various counties, as stated in the game code, it is necessary that they be presented to the board of county commissioners for examination and allowance. The two statutes do not seem to be susceptible of any other construction. It follows that the trial court was in error in not directing that the claims be presented to the board of county commissioners for examination and allowance.

The next question is whether the board of county commissioners, in the examination and allowance of the claims of the county game warden, had a right to pass upon the propriety of the expenditures. This question will be answered by a reference to the game code. In § 2 (3 Id., § 5395-2) of that act, it is provided that the county game warden shall receive a salary of not less than twenty-five dollars per month nor more than one hundred and twenty-five dollars per month, "the amount of which shall be fixed by the county game commission of each county and shall be paid solely out of the money received from county game licenses and fines, and no salary shall be fixed by said commission in excess of the amounts of the receipts herein provided for."

In § 34 (3 Id., § 5395-34) of the game code, it is provided that ninety per cent of all moneys received in any county from the sale of county hunting and game fish licenses, and from fines and costs, shall be expended in said county from which the same are collected,

". . . and shall be so spent in the payment of salaries and expenses of the county game wardens or special deputies appointed in said county by the county game commission, and for the protection, introduction, propagation and purchase of animals, birds and game fishes in said county, and in the enforcement of the game and game fish laws within said county from which said moneys are received."

By these provisions of the statute, it appears that the salary and expenses of the county game warden are to be paid

out of the game funds in the county treasury which have accrued under the provisions of that act and cannot be paid out of any other funds. These provisions of the code also delegate to the county game commission the power to determine the salary of the county game warden within the limits fixed, and to pass upon the propriety of the expenditures made by such county game warden in the performance of the duties of his office. The law having given the county game commission the right to fix the salary and pass upon the propriety of the expenditures, it would follow that the board of county commissioners, in their examination and allowance of the claims presented against the county game funds, do not have the right to determine the salary or the propriety of the expenditures. The board of county commissioners, in examining and allowing claims drawn against the county game fund, is acting in an administrative capacity or performing ministerial duties. It is not acting in a quasi judicial capacity or exercising discretionary power. Such board, even though acting in their administrative or ministerial capacity, has the right to reject claims which are illegal. This is the power which the board sought to exercise in this case, and claims were rejected because, in the opinion of the board, the expenditures for which the claims were presented were illegal.

One other point should be noticed, and that is, the contention that mandamus is not the proper remedy. Discussion of this question is unnecessary, as the cases of *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, and *State ex rel. Barto v. Board of Drainage Com'rs*, 46 Wash. 474, 90 Pac. 660, sustain the right to proceed by mandamus in this case.

The cause will be remanded with direction to the superior court to enter a judgment in accordance with the views expressed in this opinion. Costs to respondent.

MORRIS, C. J., MOUNT, PARKER, FULLERTON, ELLIS, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13300. *En Banc.* May 2, 1916.]

In the Matter of WENATCHEE RECLAMATION DISTRICT. CONRAD ROSE *et al.*, *Respondents*, v. H. A. KIMBALL, *Appellant*.[1]

WATERS AND WATER COURSES—IRRIGATION DISTRICTS—ESTABLISHMENT—CONFIRMATION—REVIEW—RECORD. In a proceeding to "judicially examine, approve, and confirm" the establishment of an irrigation district, as provided in Rem. & Bal. Code, § 6489, the findings of the county commissioners as to the insufficiency of the water supply and the semi-arid nature of the land cannot be reviewed unless the evidence introduced before the commissioners is preserved and brought before the court.

SAME—IRRIGATION—POWERS OF DISTRICT—PURCHASE OF EXISTING SYSTEM. The purchase of an existing system of irrigation works to be enlarged and reconstructed is authorized as within the spirit of the irrigation act (3 Rem. & Bal. Code, § 6417 *et seq.*), the primary purpose of which was to provide arid lands with an adequate system of irrigation; the powers of the district being general with no express prohibition of such a purchase.

SAME—IRRIGATION—DISTRICT—NAME. The designation of an irrigation district as the W. "reclamation" district is authorized by statute requiring the county commissioners to designate a name, without restriction.

SAME—IRRIGATION—DISTRICTS—ESTABLISHMENT — CONFIRMATION—RECORD. Under 3 Rem. & Bal. Code, § 6417, authorizing a petition for the organization of an irrigation district to be presented at a regular meeting of the board of county commissioners, or at a special meeting ordered to consider the petition, the record need not show whether the meeting was a regular or a special one, in view of the requirement that the court, on proceedings to confirm, must disregard any error, irregularity or omission not affecting substantial rights.

EVIDENCE—MEETINGS OF COUNTY BOARD—ADJOURNMENTS — PAROL EVIDENCE. It may be shown by the testimony of the clerk that the meetings of the board of county commissioners were adjournments of a regular meeting to designated days, although not so entered in the minutes.

WATERS AND WATER COURSES—IRRIGATION DISTRICTS—ESTABLISHMENT—PROCEEDING—NOTICE—DESCRIPTION. Notices for the organization of an irrigation district, required to contain a description of

[1]Reported in 157 Pac. 38.

the property to be included in the district, are sufficient where the boundary line is traced through various government corners, the sections, township and range being designated by the use of figures in accordance with the custom in government surveys.

EVIDENCE — JUDICIAL NOTICE — GOVERNMENT SURVEY. The courts judicially know the manner in which government surveys are extended over public lands, and approximately the location of the base and meridian lines.

WATERS AND WATER COURSES—IRRIGATION—DISTRICTS—ESTABLISHMENT—DESCRIPTIONS—DISCREPANCIES. In proceedings to establish an irrigation district, discrepancies in the description of an exempted tract as contained in the petition and in the notices of the election, do not invalidate the proceedings, where there was no lapse in or uncertainty as to the exterior boundary of the district; especially where the area of the exemption is negligible and will not noticeably affect the tax levy on the remaining lands, since it may be said, as a matter of law, that it did not affect the result of the election.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 21, 1915, upon findings in favor of the petitioners, confirming the formation of an irrigation district, after a trial to the court. Affirmed.

Guy B. Groff, for appellant.

Williams & Corbin, for respondents.

FULLERTON, J.—On January 18, 1915, the board of county commissioners of Chelan county entered an order declaring certain described territory, situated in part in the county of Chelan and in part in the county of Douglas, duly organized as an irrigation district, under the name and style of Wenatchee Reclamation District; further declaring that certain named persons voted for at the election held for the organization of the district had been duly elected directors of the district. Subsequent to the entry of the order, the persons so declared elected directors met and organized as a board. At a subsequent meeting, the board found it advisable, in order to carry out the purposes for which the district was organized, to purchase an existing irrigating system then in operation over a portion of the district, and to recon-

struct, better, and enlarge the same; and to that end, found it necessary to raise money by the issuance and sale of bonds of the district, estimating and determining the amount of money required to be $350,000. An election was thereupon called and afterwards held, at which the question whether or not bonds of the district in the amount so estimated should be issued was submitted to the electors of the district. A canvass of the vote showed a majority in favor of the issuance of the bonds and the board so declared, entering an order on their minutes to that effect.

On November 26, 1915, the board of directors of the district filed a petition in the superior court of Chelan county, particularly setting forth the proceedings had in the formation of the district and the authorization of the issuance of the bonds, and alleging generally that the district under its adopted name was a duly and regularly organized irrigation district under the act of the legislature of the state of Washington approved March 20, 1890, and the acts amendatory thereof and supplemental thereto, and praying that the court fix a time and place for hearing such petition, and that upon such hearing it examine, approve and confirm such proceedings.

Due notice of the hearing on the petition was given, and prior to the time fixed therefor, one H. A. Kimball appeared and filed an answer to the petition, in which he alleged that he is the owner of certain lands situated in the county of Douglas and within the boundaries of the district, which land was attempted to be incorporated into the district as a part thereof. The answer put in issue substantially all of the allegations of the petition relative to the legal sufficiency of the proceedings had in the organization of the district, specially questioning the legal sufficiency of the notices given of the elections held relative to the formation of the district and the regularity of the meeting of the board of county commissioners at which the petition for the organization of the district was presented. It was alleged affirmatively that the notices

given of the intended formation of the district failed to correctly or properly describe, or describe at all, the lands intended to be included in the district; that the notices did not describe the purported district as it was described in the original application for its formation; that all of the lands attempted to be included in the district then had an adequate and sufficient supply of water from other sources, and that much of the land was not arid or semi-arid; and that the name adopted as the name of the district was not one permitted by law to be adopted as the name of an irrigation district.

A hearing was had on the issues raised by the petition and the answer thereto, resulting in findings and conclusions by the court to the effect that the proceedings for the organization of the district were regular, and in a decree confirming the same. From this decree, Kimball appeals.

At the hearing had in the superior court, the petitioners offered no evidence in support of the finding of the board of county commissioners to the effect that the land included within the boundaries of the district did not have a sufficient water supply from another source, or that such lands were arid and semi-arid, but contented themselves with the showing that such proofs had been made before the board at the hearing had on the petition for the establishment of the district, and that the board had found the facts to be in accordance therewith. The appellant, in support of the allegations of his answer to the contrary, offered to prove that the facts were not in accord with the findings of the board; that, in fact, the lands in the district were then being supplied, and had at all times been supplied, with sufficient water for irrigating purposes and were not arid or semi-arid lands. This offer of proof the trial court rejected, and its ruling in that regard constitutes the first error assigned.

The court seemingly excluded the evidence on the authority of the case of *Hanson v. Kittitas Reclamation District*, 75 Wash. 297, 134 Pac. 1083. In that case we held that a land owner, whose lands had been included in an irrigation district

regularly organized and confirmed, could not have the same excluded by an independent action based on the ground that such lands had at the time of the organization of the district a sufficient supply of water from another source and were thus wrongfully included within the district. But the ruling was rested on the principle that that action was in the nature of a collateral attack on the proceedings; that the findings and conclusions of the board were final in such an action and that they could be reviewed only in some revisory or correctory proceedings authorized by law for that purpose, of which that action was not such. The present proceeding is one specially authorized to "judicially examine, approve, and confirm," the action of the board and plainly, we think, the principle of the case does not apply.

But we think the ruling was nevertheless without error. Since the power of the court in the confirmatory proceedings is to "judicially examine, approve and confirm" [1] the proceedings of the board of county commissioners is case it shall find them in conformity with the statutes, and to declare them illegal in whole or in part in case it finds that they are not so, it seems to us to follow that the right of review is confined to the record made by the board. This does not mean that the findings of fact made by the board may not be reviewed in any manner in the reviewing court, but means that such findings can be reviewed only upon the evidence introduced before the board. In other words, if the person controverting the facts which the board must find in order to lawfully establish the district wishes to have the facts reviewed in the confirmatory proceedings, he must cause the evidence introduced before the board to be preserved and brought before the superior court as other parts of the board's records are brought before it. To contend otherwise, is to contend that the party objecting may ignore the board entirely and present his evidence in the superior court only; a proceeding which will result in a second independent trial of the facts

[1]Note: Rem. & Bal. Code, § 6489.—REP.

necessary to be found in order to justify the establishment of the district, on evidence not before the board and on which the board might have refused to establish the district had it been presented to it. It is our conclusion that the statute does not contemplate such a retrial, and for that reason that the ruling of the court is without error.

In the proceedings had for the organization of the district and in the resolution of the board of directors of the district authorizing the issuance of bonds, it is recited that one of the purposes of the organization is to purchase, enlarge, and reconstruct an existing system of irrigation works then in operation in the district, but which had become inadequate to furnish for the irrigable lands situate therein a sufficient supply of water. It is contended by the appellant that the statutes as they then existed did not contemplate an organization for such a purpose, and he argues that the organization is invalid for that reason. But without following the argument, we think the statute sufficiently broad to permit the organization of a district for the purposes intended. The language of the statute defining the powers of the district is more or less general, and there is no express provision prohibiting such a purchase. Its primary purpose is to enable owners of lands situated in the arid regions of the state to provide their lands with an adequate system of irrigation, and its language should not be so construed as to restrict too narrowly this purpose. Plainly, such a purchase is within the spirit of the act, and we cannot conclude it to be without its letter.

The next contention is that the court erred in holding that the name, "Wenatchee Reclamation District," may be properly used as a name for an irrigation district. But the requirement of the statute is that the "board of county commissioners shall . . . designate a name for the proposed district," without restriction of any kind as to the character of the name chosen. And while it is true that the statute

authorizes the organization of reclamation districts which have for their purposes something entirely different from that of irrigating arid lands, yet, we cannot think the name so far confusing as to warrant the holding that an irrigation district could not be properly organized with such a name.

The next contention is that the petition for the organization of the district was not presented for consideration at a regular meeting of the board of county commissioners of Chelan county. Since the statute (Laws 1913, p. 558; 3 Rem. & Bal. Code, § 6417) permits a petition for the organization of an irrigation district to be presented at any regular meeting of the board, or at a special meeting ordered to consider and act upon the petition, we are not certain that we have caught the precise point of the objection. The record shows that the petition for the organization was signed by the required number of holders of title to land within the proposed district, that notices were regularly published reciting that the petition would be presented to the board of county commissioners on a day and hour named in the notice, and that it was so presented, the board being then in session. The notice does not recite whether the meeting was a regular meeting of the board, or whether it was one specially called to consider the petition, nor does the minutes of the board's meetings show the fact. We assume, therefore, that the appellant means to contend that, since this is an action brought to review the proceedings of the board in establishing the district, no presumptions of regularity will be indulged in, but that, on the contrary, the proceedings must show regularity on their face. But the statute authorizing the review prescribes that the court, in inquiring into the regularity, legality, or correctness of the proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of any party to the proceedings. Clearly it could not affect any of the rights of the parties to this proceeding whether the meeting of the board was a regular

meeting, an ordinary special meeting, or a meeting specially ordered to consider and act upon the petition, and the silence of the record in that respect we conclude cannot be fatal to the proceedings. After all, the notice is the principal consideration, and if this was regularly given, as the trial court found, the character of the meeting of the board,—that is, whether a regular meeting, a special meeting, or one specially ordered to consider the petition, cannot be material.

The foregoing conclusion is based on the record made by the board of county commissioners themselves. It was testified, however, by the clerk of the board, that the meeting was a regular meeting of the board which had adjourned from time to time to that date after its regular meeting day on October 5, 1914. The adjournments were not entered on the minutes of the board, although meetings were held on the designated days to which the clerk testified the adjournments were taken. It is contended that the clerk's testimony was not admissible to prove the fact, but we think it competent. This court, in common with many other courts, has held it competent to show by parol a contract entered into with the board not recorded in their minutes (*Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999); and the same principle would permit the showing by parol of an adjournment of the board to a day certain where such showing supplements and is not contradictory of the record. Whether, therefore, we consider the record as made, or as supplemented by the oral proofs, we think there is no merit in the objection made as to its sufficiency.

It is next contended that the court erred in holding sufficient the notices given of the intent to present to the board of county commissioners the petition for the organization of the district, and the notices given of the election held to determine upon the organization of the district. The statute requires that these notices contain a description of the property to be included within the district, and the claim is that

these descriptions are insufficient. The notices contained, first, a description of a tract of land by metes and bounds; second, certain specifically described tracts not included within the first description; and third, certain specifically described tracts which were exempted from the other descriptions. In the description by metes and bounds, the boundary line is described as beginning at a certain quarter section corner "of Section 26, Township 24, North, Range 18, E. W. M.," and running thence to various other section corners, some of which are described by the use of figures to designate the township and range, omitting the ordinary and usual abbreviations; thus, the boundary is described as running to the "north line of section 13-23-19;" "to the quarter corner between sections 16 and 21-23-20;" "to the S. W. 1/4 of Sec. 21-23-20;" and similar descriptions are given for many other points in the boundary line. The appellant argues that these are hieroglyphics merely, without meaning, and hence render the description unintelligible. Land surveyors and engineers familiar with land surveys, called by the respondent, however, had no difficulty in determining the meaning; testifying that the figures designated the section, township and range in which the mentioned corner was situated, and that no surveyor or engineer would have difficulty in tracing the line because of the use of these abbreviations.

But if the question be one of law to be determined by the court from the language used in the notice itself and not from extrinsic evidence, we are constrained to hold the description sufficient. We know judicially the manner in which the government surveys are extended over the government lands, and know approximately at least in the same manner the location of the base and meridian lines from which the townships and ranges into which the surveys divide the land are numbered. We are advised from the general description that the lands included within the district lie within the counties of Chelan and Douglas, and therefore lie north of the base and east of the meridian line. We know, further-

more, that these corners are described with reference to the government surveys, and that, in so describing land, the use of figures to denote the section, township, and range are usual and in accordance with custom. Applying this knowledge, we are unable to see in what manner the description could be misleading, or that the use of the abbreviation adopted could mean other than the section, township, and range in which the point in the boundary line mentioned is situated.

The only precedent cited to us which passes upon the direct question is found in the case of *Little Rock & Fort Smith R. Co. v. Evins*, 76 Ark. 261, 88 S. W. 992. The court there held such a description sufficient, using this language:

"It is contended by appellant that the description of the land in the deed adduced by the appellee in the trial of this action as evidence of his title to the land appropriated for right of way was not sufficient to identify the land. It is described in one deed as N. E. fr. quarter of the N. E. fr. quarter, section 22-8-22 W., and in the other, N. E. fr. N. E. quarter of section 22, township 8, N., range 22 W. It was described in both deeds as situated in the county of Johnson, in this state. It was admitted by the parties that the tract in controversy contained seven and nine-hundredths acres. We understand from this description that the land meant is the northeast fractional quarter of the northeast quarter of section twenty-two, in township eight north, and in range twenty-two west, situated in the county of Johnson, in the state of Arkansas. This description is sufficient."

In the petition for the formation of the district, a certain tract of land in the list of property exempted from the general boundaries was described as a certain ten-acre tract in section 10, township 22 north, range 20 east of the Willamette meridian; while in the notices given of the election held for the organization of the district, the corresponding description is a tract containing 2.5 acres in section 5, of the same township and range. The final order of the board of county commissioners exempted the tract described in the original petition. It is suggested that this discrepancy is

fatal to the proceedings, since the result is that the published notices of the election for the organization of the district did not correctly describe the lands included within the boundaries of the district as established by the board. But it is our opinion that the discrepancy cannot have the effect of avoiding the entire proceeding. It leaves no lapse in, nor does it create any uncertainty as to, the exterior boundary of the district. This is correctly described if either of the descriptions be adopted as the description of the tract intended to be excluded, and the requirement of the statute that the published notices of the election "shall describe the boundaries" of the established district has been complied with.

But perhaps the real question is, can the court say, as a matter of law, that the election would not have resulted differently had the notices of the election shown the intent of the organizers of the district to exempt ten acres of land in the section numbered 10, instead of 2.5 acres in the section numbered 5. It seems to us that it can be so said. Compared with the entire area of the district, the area of the exempted portion is negligible. Whether the tract be included or excluded, the tax levy on the remaining lands necessary to sustain the district and pay off the contemplated issue of bonds will not be noticeably affected. We cannot think, therefore, that any elector who voted for the organization of the district would have voted otherwise had these notices correctly described the land to be exempted. None of them, at least, are here so contending.

Our conclusion is that the order and judgment of confirmation entered by the trial court should be affirmed. It is so ordered.

MOUNT, HOLCOMB, ELLIS, PARKER, MAIN, CHADWICK, and BAUSMAN, JJ., concur.

[No. 12972. Department One. May 6, 1916.]

PAUL WILSON *et al.*, *Appellants*, v. E. W. MILLS *et al.*, *Respondents*.[1]

VENUE—REAL PROPERTY—RESCISSION—LANDS IN TWO COUNTIES—CHANGE OF VENUE. An action for the rescission of a trade of lands located in M. county for lands in K. county is as much local to K. county as to M. county where the action was brought, and it is not error to grant a change of venue to K. county.

EXCHANGE OF PROPERTY—RESCISSION—MISREPRESENTATIONS—RELIANCE. Where plaintiff, in an action for the rescission of a trade of land for fraud, knew that representations in a memorandum describing the land were not literally accurate, he cannot be heard to say that he relied upon them as being literally accurate.

SAME—FRAUD—EVIDENCE—SUFFICIENCY. In an action for the rescission of a trade of lands, a rough sketch as to the course of a river cannot be made the basis of actionable fraud, where it was hastily made and only intended to represent the general course of the river and must have been so understood.

SAME. Misrepresentations as to the boundaries of a tract of land do not warrant a rescission, where a line was merely indicated from a distance without any attempt to point out its exact location, and no shortage was claimed.

SAME. In an action for rescission of a trade of lands, the burden being upon the plaintiff to establish fraud in misrepresenting the amount of bottom land in the tract, he is not entitled to recover upon a showing that two surveys were made which were directly conflicting and one showed the truth of the representations.

SAME. A rescission of a trade of lands for fraud in misrepresenting the character of the land is properly denied, where the evidence as to the misrepresentations respecting the quality of the land were directly conflicting, plaintiff examined the land, no artifice was exerted reasonably calculated to prevent further examination, and the parties dealt at arm's length and put in their respective properties at inflated trading prices.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 30, 1915, dismissing an action for rescission, after a trial on the merits to the court. Affirmed.

[1]Reported in 157 Pac. 467.

W. H. Abel, A. M. Abel, and *Farrell, Kane & Stratton,* for appellants.

Turner, Hartge & Turner and *Alexander & Bundy,* for respondents.

ELLIS, J.—Action to rescind an exchange of properties, on the ground of alleged fraudulent representations. Sometime in August, 1914, plaintiffs exchanged lots 4, 5, and 6, of block 1, Sturtevant's Rainier Beach Lake Park Cottage Tracts, in King county, subject to a mortgage for $3,500 and some interest, for two hundred acres of land in Chehalis, now Grays Harbor, county, and approximately forty-two acres in Mason county, owned by defendants. The two hundred acres was subject to a mortgage for $7,500 and some interest. The Mason county land, which was held under contract from the state, was subject to unpaid installments of the purchase price, amounting to $280 and some interest. In addition to the land, the defendants also contributed to the exchange thirty-eight cows, certain calves, horses, hogs, hay, oats, household furniture, tools, implements, etc. Plaintiffs, for the purpose of the trade, valued their King county property at $16,500, defendants assuming the mortgage on it. Defendants valued their land for the purpose of the trade at $28,000, plaintiffs assuming the indebtedness against it, giving a chattel mortgage for $3,500 to offset the mortgage assumed by defendants and paying the difference of $4,000 in money. The deeds were exchanged on August 21, 1914, and possession soon after. The land in Grays Harbor county consists of five forty-acre tracts four of which lie lengthwise abutting on the line between Grays Harbor and Mason counties, the fifth immediately west and the land in Mason county immediately east of the southerly of the four first mentioned forties.

Plaintiffs charge that defendants falsely represented that the Grays Harbor county land was distant, by the traveled road from Matlock, only four miles, and from Satsop, only

eight to ten miles; that all of the land in that county was bottom land, mostly first bottom, all with soil from three to four feet deep, not gravelly nor liable to erode; that only fifteen acres were in the bed of the Satsop river and that the river ran through only two of the forties; that the other three forties were wholly east of the Satsop river; that there was a fine strip of pasture land west of the river in the west forty; that the oat patches on the land contained sixteen acres; that the oat crop, which was then ready for harvest, would run from ninety to one hundred bushels to the acre; that there were then in the barn from one hundred to one hundred twenty tons of good hay; that the income from the thirty-eight cows was from $80 to $90 every two weeks; and that the lands were of as great fertility as Chehalis river bottom lands. It is alleged that plaintiffs relied upon these representations in making the exchange. All of these charges were put in issue by the answer. The action was originally commenced in Grays Harbor county, but, upon application of defendants for a change of venue, was transferred to King county for trial.

After a lengthy trial, and after the trial judge had examined the respective properties, a judgment was rendered dismissing the action upon its merits, neither party to recover costs. Plaintiffs appeal.

It is first urged that the court committed error in granting a change of venue. It is argued that, inasmuch as two hundred acres of the land were located in Grays Harbor county, under the doctrine announced in *Seymour v. LaFurgey*, 47 Wash. 450, 92 Pac. 267, the action was local and should have been tried in that county. This argument overlooks the fact that the real purpose of the action was to recover real property situated in King county. Assuming, without deciding, that an ordinary action of rescission of a land sale is local to the county where the land lies, in this case it is certainly as much local to King county as to Grays Har-

bor county. We find no error in the granting of the change of venue.

On the merits, the main contention is that there was fraudulent and inducing misrepresentations as to the proportion or amount of bottom land in the two hundred acres located in Grays Harbor county. Shortly after the commencement of this action, two surveys were made; one on behalf of the appellants classifying the land in Grays Harbor county as follows: hill land 14 acres, gravel bench 26 acres, river bed and gravel bars 40.3 acres, bottom 116.6 acres, total 196.9 acres; the other on behalf of the respondents classified the same land as follows: first bottom 117.4 acres, second bottom 6.3 acres, bench 13.3 acres, upland 32.5 acres, river and gravel bars 30.5 acres, total 200 acres. The alleged misrepresentation is based largely upon a memorandum made by one Simpson, agent for respondents, from information gathered in various conversations with Mills and given to appellants a few days before the parties met. This is referred to as the "yellow sheet" and reads:

"Near Satsop. Price for all $30,000. 242 acres. 55 upland and timbered. Balance mostly bottom land. All available for pasture that is not entirely cleared for ploughing. 38 cows. 1 registered Guernsey bull. Fine one. 8 yearling heifers. 12 this year heifers. 1 registered imported black Percheron stallion. 2 registered black Percheron mares; one imported. 2 registered black fillies. 1 registered black colt. Can carry 50 cows. 16 hogs. 1 brood sow. 8 pigs. 100 to 125 tons of hay. About 1500 bushels oats—spuds, rutabagas, etc. All tools, machinery and furniture. Good 9 room house, concrete foundation. Barn 75x90; stables on each side. 2 hog buildings. 2 chicken houses. 1 milk room and separator. Wood house, smoke house, etc. Full equipment of tools, wagon, lawnmower, rake, discs, harrow, etc. E. F. Simpson, care Burwell & Morford."

A few days before August 9th, the parties met in a real estate office in Seattle and talked over the prospects of an exchange, finally agreeing that together they would visit the land so that appellants might examine it. This trip was made

on August 8th or 9th, at which time appellants spent some three or four hours in examining the property in company with respondent Mills and one Gokey. Appellant Paul Wilson testified that he had the yellow sheet with him on the trip for the purpose of comparison with observed conditions. He knew that the Mason county land was all upland timbered. He knew that, if there were in all fifty-five acres of upland timbered, there would be left but one hundred and eighty-seven acres to meet the description "balance mostly bottom land." In addition to this, the sketch or map made by Mills at their first meeting, to which we shall presently advert, shows a tract marked "second bottom," which Wilson testified Mills told him contained about fifteen acres. Wilson, while examining the land, was on this tract and knew that it was included in the yellow sheet estimate of "balance mostly bottom land." He knew, also, that the Satsop river flowed across at least two of the forties. He knew, therefore, that whatever of the land was in the river bed and gravel bars was included in the yellow sheet estimate of balance mostly bottom land, as well as the fifteen acres of bench or second bottom. There was no representation in this yellow sheet as to how much of the land was actually river bed and gravel bars, but Wilson knew—he must have known—that it was included and classified as bottom land. Knowing, then, that the statement in the yellow sheet was not literally accurate, he cannot now be heard to say that he relied on it as being literally accurate.

In addition to the representations contained in the yellow sheet, appellant Paul Wilson testified that, at the first meeting with Mills and while he, Wilson, had the yellow sheet in his possession, Mills told him, in response to a direct question, that there were about fifteen acres in the river, also "At this time he said there was one hundred and seventy acres of bottom." This, however, was apparently his own deduction. He said: "I asked him how many acres of second bottom, this gravel bench. 'Fifteen,' he said, and taking thirty from the

total left one hundred and seventy as I understood it. I supposed when I bought the place I bought one hundred and seventy acres of bottom land." Yet he knew at that time that part of this one hundred and seventy acres was upland timbered. Mills categorically denied making these statements. He said, in substance, that he told Wilson the farm contained two hundred and forty acres, forty acres upland and a little more adjoining it, but the other two hundred acres, or thereabouts, were mostly bottom land. But assuming that he told Wilson at this first meeting what Wilson says he did, nevertheless, when Wilson went to the land, saw the bench land which Mills had estimated at fifteen acres, knew that there were at least fifty-five acres of upland timbered, and that at least thirteen acres of this fell in the two hundred acres in Grays Harbor county, and knew that the river crossed at least two of the forties and cut the corner of a third, he must have known that Mills had included in his classification of two hundred acres of bottom land all of the land in the gravel bars and the river, wherever it was, just as Simpson had included it in the yellow sheet.

Appellants concede, in their opening brief, that, as to whether Mills actually represented that there were only fifteen acres of river bed was decided against them on fairly conflicting evidence, and state that this point is not pressed on this appeal. That concession seems to us to concede the point so strongly argued touching representations as to the amount of bottom land, since, under the evidence, the river bed and gravel bars, whatever the amount, were included by Mills in the general classification of bottom land, and Wilson as a reasonable man must have so understood it.

The actionable misrepresentation, if any, as to the classification of the land is thus reduced to the claim that Mills represented that the river did not cross the north forty of the two hundred acres in Grays Harbor county. This is based entirely upon the sketch made by Mills. It shows the river as entering the land a little north of, and cutting a

small area from, the southeast corner of the north forty, flowing diagonally across the next forty to the south, passing off the land near the southwest corner of that forty and again entering near the west line of the west forty, thence across it, and out near the southwest corner. As a matter of fact, as shown by both surveys, the river enters the north forty near the middle of the north line and flows thence easterly and south along the east line of that forty, entering the next forty to the south at its northeast corner and thence approximately as shown upon the sketch. From a careful reading of the entire evidence on the subject, we are satisfied that Mills drew this sketch hastily, only intending to represent the general course of the river, and that Wilson must have so understood it at the time. Both Mills, and Simpson, who was present when the sketch was made, testified in substance that Mills said he did not know exactly where the river ran, "It runs something like this," and hastily drew a line south of the place as shown, then erased it saying, "It don't go like that, it goes more this way," and drawing a line as it appears in the sketch. The sketch itself shows the erasure of the first line and bears evidence of hasty execution. Whether Mills knew exactly how the river affected the north forty, though he still says he did not, the evidence is far from convincing that, in making this sketch of the location of the river, he intended to deceive Wilson or to represent it as an exact sketch of its location. If the testimony of Mills and Simpson is to be believed, Mills stated at that time that he did not know the exact location of the river and intended only to give an approximate idea of its course. Whether he did know or not, the rough sketch so qualified cannot successfully be made the basis of actionable fraud.

The claim of misrepresentation of boundaries is extremely elusive. It rests in Wilson's statement that Mills pointed out at a distance the west line of the north forty as running along the edge of the hill. Mills disputes this and says he told Wilson he thought the line ran near the timber. The evidence as

a whole makes it plain that Mills did not attempt to point out the exact lines and in fact did not know them. The distance of the parties from the west line at the time would seem to preclude a definite indication of its exact location, on the one hand, and a definite apprehension on the other. No shortage is claimed in the entire tract. Wilson received the full two hundred acres in Grays Harbor county. If he was relying upon the location of this west line at some definite place as an inducing factor in the trade, he should then have asked for something more definite than he claims to have received, or should have called for a survey. The fact that he did neither is strongly indicative that he did not then consider the exact location of this west line of controlling importance.

The alleged misrepresentation of amount of upland also rests upon the yellow sheet. This contains the statement that there were fifty-five acres upland timbered. Both parties knew that the land in Mason county, about forty-two acres, was of that character, which would leave approximately thirteen acres of timbered to be found in the two hundred acres in Grays Harbor county. The survey made on behalf of Wilson and introduced by him shows only fourteen acres of upland in this two hundred. True, the survey made on behalf of Mills shows thirty-two and five-tenths acres of upland; but in this was evidently included part of what Wilson's surveyor designated as bench land. On such conflicting evidence touching the classification of this land, we cannot say that the trial court was not warranted in taking Wilson's evidence as his guide, since the burden of proving the alleged fraud was upon Wilson.

We cannot discuss in detail the evidence touching the various other allegations of fraudulent misrepresentation within the limits of an opinion. As to what the oats would yield, the probable amount of hay, and the comparison with Chehalis bottom land, we are satisfied that Mills attempted no more than an expression of opinion. The representation as to the income from the land is more serious; but upon this,

the evidence is in direct conflict. Mills denies having represented that his income from the land had been $5,000 a year. He also denies having represented that his income from the cows had been $80 or $90 every two weeks. He states that he told Wilson that he had planned to acquire fifty good Guernsey cows which he believed the land would support and that from these he could realize something like the amounts stated. Upon this conflict of evidence, we cannot say that the court would have been justified in finding actionable misrepresentation as to the income.

Every case of this character must rest upon its own facts, subject to certain general principles. We shall not attempt a detailed discussion of the many decisions cited from this and other courts. Wilson actually examined the land. Mills, so far as the record shows, exerted no artifice reasonably calculated to deter any ordinarily prudent man from a further examination if desired. We think the case is governed by the rule laid down by Pomeroy as follows:

"If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." 2 Pomeroy, Equity Jurisprudence (2d ed.), § 893.

See, also, *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142; *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746.

Finally, it must be remembered that Wilson was a man thirty-seven years old. Though not a farmer, he was a successful business man. The parties were dealing at arm's length. They had never met before this transaction. There was no relation of confidence between them nor any disparity in intelligence. So far as the record shows, Wilson knew as much about farm lands as Mills knew about city property. Wilson went all the way from Seattle to Grays Harbor county to examine this land. He cannot be heard to say that he looked at nothing but what Mills pointed out, saw nothing but what Mills wanted him to see, knew nothing but what Mills told him, acted on nothing but what he learned from Mills. It must be remembered this was a trade. The evidence makes it too plain for doubt that both parties puffed their wares and put in their respective properties at inflated trading prices. We are impressed with the justice of the trial court's language in his memorandum decision, which both parties have treated as findings:

"There is also credible testimony that, for some time before the formal act of rescission, Wilson had been convinced of his mistake in making the trade but reconciled himself to it with the thought, which he expressed, that even if he had made a bad bargain, Mills on his part had a poor bargain, for the Rainier Beach property had been largely overestimated in the deal. It is patent to the court, from the knowledge of both properties, that each party exaggerated the true value of his own property, and that such exaggeration was of about the same proportion in each instance. The properties were inflated in price for the purpose of trade. It is not fair to estimate one from a cash value and the other as a trading proposition."

The case has been one of much difficulty. We cannot, of course, discuss all of the evidence, but we have read all of it and considered all of it. It fails to warrant a reversal. The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13002. Department One. May 6, 1916.]

THE STATE OF WASHINGTON, *on the Relation of F. J. Cummings, etc., Appellant*, v. C. E. BLACKWELL *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—INCORPORATION—VALIDITY—EXCESS AGRICULTURAL LANDS. The inclusion of excess agricultural lands within the limits of a town does not necessarily render the entire incorporation proceedings void, although the lands might not be affected by the incorporation.

APPEAL—FINAL ORDERS—QUO WARRANTO—ACTION TO COMPEL—PETITION—SUFFICIENCY — PRELIMINARY ORDER — DUTY OF PROSECUTOR. Under Rem. & Bal. Code, § 1035, providing that informations in the nature of *quo warranto* may be filed by the prosecuting attorney upon his own relation if he deems it his duty, or by direction of the court, an order overruling the prosecuting attorney's demurrer to a petition to require him to file an action in *quo warranto*, and directing him to make an investigation and exercise his discretionary power in the matter of commencing *quo warranto*, is not a final order in the proceeding and is therefore not appealable; since it contemplates an answer by the prosecuting attorney, and a plain case is required to warrant a peremptory order requiring an action in *quo warranto*.

Appeal by petitioner in mandamus, from an order of the superior court for Okanogan county, Pendergast, J., entered June 8, 1915, directing the prosecuting attorney to make an investigation, upon overruling a demurrer to a petition to compel *quo warranto* proceedings. Appeal dismissed.

J. M. Adams, for appellant.

W. H. Patterson, for respondents.

MOUNT, J.—This action was brought in mandamus by F. J. Cummings to require the prosecuting attorney of Okanogan county to file an action in *quo warranto* against the officers of the town of Riverside to determine the alleged invalidity of the incorporation thereof.

[1]Reported in 157 Pac. 223.

The facts alleged in the petition are substantially as follows: On November 24, 1913, the county commissioners of Okanogan county made an order incorporating the town of Riverside and including certain described lands therein. On May 10, 1915, Mr. Cummings filed his petition, alleging that he is a property owner and taxpayer within the boundaries of the alleged corporation; that certain inhabitants of the unincorporated town attempted to incorporate the same as a town of the fourth class; that within the boundaries of said town is a tract of land containing twenty-two acres, owned by the petitioner which is entirely excluded from said corporation; that this tract of land is unplatted; that, in addition to that tract, the petitioner was the owner of twenty acres of unplatted land adjoining thereto, within the boundaries of said corporation, and also seventy-six acres within the boundaries of said town, which last mentioned tract was platted, described, and designated as "Glenwood Acre Tracts, and First Addition to Glenwood Acre Tracts," designed to be used for agricultural purposes only, and not intended to be used for town lots or blocks, having no streets or alleys; that he protested against the inclusion of ninety-six acres of his agricultural land within the boundaries of the corporation, and objected to the inclusion of more than twenty acres therein. It is also alleged that there was territory embraced within said purported corporation not contiguous thereto; that certain persons named in the petition were pretending to act as officers of the said town, and were levying taxes against said property of the petitioner for a waterworks system, and $1,000 towards the building of a bridge across the river at said town.

He further alleges that he presented to the prosecuting attorney of Okanogan county all the facts alleged in his petition, together with an information in the nature of a *quo warranto*, and the evidence to support the same, and requested the prosecuting attorney to sign and verify said petition and bring an action against the alleged officers of the

pretended town to require them to show cause by what right they assumed to exercise official duties, and to test the validity of the incorporation, and the inclusion of the petitioner's land within the boundaries thereof; that the prosecuting attorney ignored the petition and the facts laid before him, and failed and refused to take any action therein.

Upon the filing of the petition, the court issued an order requiring the prosecuting attorney and the officers of the town to show cause why the prosecuting attorney should not proceed as requested. On the return of this order, the prosecuting attorney demurred to the petition, which demurrer was overruled. The prosecuting attorney elected to stand upon the demurrer. The court then entered an order containing, among other things, the following:

"And said prosecuting attorney electing in open court to stand upon his said demurrer, now, therefore, it is further ordered that the said prosecuting attorney be and he is hereby required to investigate, and said prosecuting attorney be and he is hereby required to make an honest, *bona fide* investigation of the matters and things set forth and referred to in the amended petition herein, and exercise his discretionary power in the matter of commencing an action in the nature of *quo warranto* to test the validity of the incorporation of the town of Riverside in said county, and to commence such suit if in his honest judgment the facts warrant the same."

The petitioner has appealed from that order. It would appear from the title of the action [on the briefs] that the prosecuting attorney has appealed from the order of the court; but that is not the fact. The prosecuting attorney has not appealed. The petitioner, Mr. Cummings, is the appellant.

The respondent moves to dismiss the appeal for the reason that the order appealed from is not a final order. We think this motion must be sustained. It is apparent that the appellant claims that the town of Riverside is illegally incorporated by reason of the fact that certain lands belonging to the petitioner are included within the limits of the corpo-

ration. There is nothing upon the face of the petition to indicate that the county commissioners in forming the corporation did not proceed as required by law. If the corporation is regular and legal otherwise, it seems plain that the fact that lands were included within the corporation which ought not to have been included, does not render the incorporation invalid. If lands are included therein which ought not to have been included, those lands might not be affected by the incorporation of the town. But that fact would not necessarily render the whole proceedings for incorporation void and of no effect.

The statute provides, at Rem. & Bal. Code, § 1035 (P. C. 81 § 1797), with reference to informations in the nature of *quo warranto*, as follows:

"The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information."

Assuming that all the facts stated in the petition are true, we think the court was not required to enter a peremptory order requiring the prosecuting attorney to commence or maintain the action in *quo warranto;* but it was the duty of the court, as he did, to order the prosecuting attorney to investigate the facts, and then determine whether he would or would not file the information in *quo warranto*. It seems plain from the order quoted that the order, in effect, requires an answer to the petition after the prosecuting attorney has investigated the facts. When the answer is filed, if issues are made, the trial court will determine the controversy and enter a final order. But it is apparent to us that the order entered at this time is only final so far as it directs the prosecuting attorney to investigate the facts. The prosecuting attorney has not appealed from that order; and we are satis-

fied it is not a final order such as may be reviewed at this stage of the proceeding so that the prosecuting attorney may be peremptorily required to file the information sought. As was said by this court, in *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 Pac. 987, quoting from *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707:

"But to compel a district attorney, against his will and contrary to his judgment, to merely *commence* an action would be an idle thing in the absence of power to compel him to prosecute it to final determination; and such power is not contended for by appellant. And, indeed, there could be no practicable exercise of such power. The court granting the writ of mandate could not follow the district attorney through the case, and see to it that he filed proper pleadings, offered sufficient evidence, made necessary objections to evidence offered by defendant, used proper arguments and authorities in discussing questions raised before the court or jury, and conducted the trial with reasonable care and diligence."

Before the prosecuting attorney should be required to file an information in *quo warranto*, a plain case should be made by the petitioner, so that there could be no doubt that the prosecuting attorney would be justified in maintaining the *quo warranto* proceeding.

For these reasons, we are constrained to dismiss the appeal.

MORRIS, C. J., CHADWICK, and BAUSMAN, JJ., concur.

ELLIS, J., concurs in the result.

[No. 13033. Department One. May 6, 1916.]

THOMAS B. MEEHAN *et al.*, *Appellants*, v. W. D. INGALLS, *Respondent*.[1]

SALES—WARRANTY—BREACH—EVIDENCE—SUFFICIENCY. The mere fact that seeds, sold upon express warranty as to their germinating quality, did not grow when planted in good soil, is not sufficient to show a breach of the warranty, where a germination test before sale showed that the seeds were good, and the buyer kept them too long in water and placed them on ice allowing the ice to melt, which tended to prevent germination.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered February 2, 1915, upon findings in favor of the defendants, in an action on contract, tried to the court. Reversed.

Englehart & Rigg, for appellants.

Thomas H. Wilson and *Guy O. Shumate*, for respondent.

MOUNT, J.—This action was brought by the plaintiffs to recover $302.60 from the defendant, being the agreed price of crab apple and pear seed sold to the defendant.

The defendant, for answer to the complaint, admitted that he ordered the seeds at the price alleged, but denied all the other allegations of the complaint; and as an affirmative defense alleged, in substance, that the defendant purchased the seed for planting and growing a nursery; that the plaintiffs knew the purpose for which the defendant purchased the seed; that the defendant planted the seed properly and cultivated the same, but none of the seeds germinated or grew. For a cross-complaint, the defendant alleged that he had been damaged in the sum of $562 by reason of the fact that the seeds did not germinate and grow, and by reason of preparing and cultivating the land upon which the seeds were planted. The reply denied the allegations in the affirmative answer and in the cross-complaint. Upon these issues, the

[1]Reported in 157 Pac. 217.

case was tried to the court without a jury, and a judgment was entered in favor of the defendant for the sum of $127.53. The plaintiffs have appealed from that judgment.

The facts are as follows: On October 28, 1912, the appellants wrote a letter to the defendant stating that they had just received certain seeds, and quoting prices thereon. In this letter, it was stated as follows:

"This seed will be of the usual first class germinating quality that we have furnished in the past. There is none better. Prospects of a crop at the present writing are encouraging. Place your order early and have your quantity reserved. Seed will be ready for delivery latter part of January, 1913."

The respondent had dealt with the appellants for some time in seeds. Upon the letter heads of the appellants, was printed this statement:

"Guarantee: While we try to procure the very best seed on the market, we give no guarantee, either express or implied. Samples will always be furnished when applied for. If the seeds are not accepted on these terms, we must be notified at once. If they are kept it will be taken as proof that they are satisfactory."

On December 5, 1912, the defendant ordered the seeds in question from the appellants. The seeds were shipped by express, as directed, and were received by the respondent about the middle of January, 1913. The respondent, upon receiving the seeds, placed them in a creek to soak for about a week. He thereupon took them from the creek and put them in an ice-pack until the latter part of March, or the first of April, when they were planted.

After the appellants had shipped the seeds, which were sold on thirty days' time, they sent a statement of account to the respondent requesting payment. The respondent made no reply to this statement. Thereafter the appellants drew a draft upon the respondent, which the respondent refused to pay, but made no complaint concerning the quality of the seeds. Thereafter this action was brought. Then the ap-

pellants were notified for the first time that the seeds did not germinate. Before the appellants sent the shipment of seeds to the respondent, the seeds were given the usual test to determine their character, and this test showed that the seeds were good and would germinate. The only evidence in the record that the seeds were not good and would not germinate is the fact that the seeds were planted in good soil in the usual method and did not grow. There is evidence in the record to the effect that the proper method of treating seeds of this character is to wet them for a short time, and then keep them on ice until they are planted. The expert who testified to these facts stated that wetting them for two days was the longest time required; and that, if the seeds after being wet are placed upon ice, and the ice-pack is permitted to melt, the seeds will heat, and the heat will destroy the germinating quality of the seeds. The defendant's testimony shows that he placed these seeds in a creek and left them there for about a week; that he then placed them in an ice-pack; that the ice melted; and that he was required to and did renew the ice. We think it is apparent from these facts that there were at least two causes for the destruction of the germinating quality of the seeds after they were received by the respondent. If the seeds were left too long in water, they would germinate, and ice would then destroy the germination. And second, if they were properly placed upon the ice, and the ice was permitted to melt, the seeds would heat, and the heat would destroy the germinating quality. Both of these conditions are present in this case.

Assuming, without deciding, that there was an express warranty of the quality of the seeds, the testimony is not disputed that the usual test was applied to the seeds by the appellants to determine the germinating quality of the seeds, and this test showed the seeds to be good. There is no evidence to dispute the good quality of the seeds except that the seeds when planted did not grow. But as we have seen above, the method of handling the seeds by the respondent

after he received them is sufficient to show that it was through his own neglect and failure to properly treat the seeds that their germinating power was killed. We are satisfied, therefore, that the mere fact that the seeds did not grow after they received the treatment which it is conceded they received after they were in possession of the respondent, is not sufficient to show that the seeds were not good and capable of germinating at the time the respondent received them. We are satisfied, therefore, that the appellant was entitled to recover the agreed price of the seeds, and that a judgment should have been entered in favor of the appellants.

The judgment of the trial court is reversed, and the cause remanded with direction to enter a judgment in favor of the appellants for the amount claimed.

MORRIS, C. J., ELLIS, BAUSMAN, and CHADWICK, JJ., concur.

[No. 13196. Department One. May 6, 1916.]

W. G. STONER *et al.*, *Appellants*, v. R. B. FRYETT *et al.*, *Respondents.*[1]

PLEADING—AMENDMENTS—AT TRIAL. Under Rem. & Bal. Code, § 303, allowing amendments of any pleadings in furtherance of justice, the discretion of the trial court in allowing amendments will not be disturbed on appeal except for abuse; and it is not an abuse of discretion to allow a trial amendment to an answer without terms, where the plaintiffs objected to a continuance that had been granted on terms to enable them to reply to the amendment.

SPECIFIC PERFORMANCE — PLEADING — JUDGMENT ON PLEADING—EXCHANGE OF PROPERTIES. In an action for the specific performance of a contract for the exchange of properties, the pleadings do not entitle plaintiff to judgment on the theory that defendants are shown to be willing to make the exchange, where it appears that plaintiffs were unable to perform at the time of the readiness of the defendants, that the parties then verbally rescinded, and defendants had since improved their property and changed their position on account of the verbal rescission.

[1]Reported in 157 Pac. 213.

EXCHANGE OF PROPERTIES—RESCISSION—ACTING ON VERBAL RESCISSION—EVIDENCE—SUFFICIENCY. Plaintiffs are not entitled to specific performance of a contract for the exchange of properties free of incumbrances, where they were unable to remove tax liens from their property while defendants were ready and able to make the exchange, and thereupon the contract was verbally rescinded, the defendants rented plaintiffs' property and paid monthly rent thereon and made improvements upon their own property and were thereafter unwilling to make the exchange; since the conduct of plaintiffs may be shown in defense, even if the verbal rescission was of no effect.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered September 8, 1915, upon findings in favor of the defendants, in an action for specific performance, tried to the court. Affirmed.

R. A. Mackey (*E. B. Herald* and *John W. Whitham*, of counsel), for appellants.

Bryan & Colvin, for respondents.

MOUNT, J.—This action was brought to compel specific performance of a contract for the exchange of real estate.

On January 25, 1915, the plaintiffs were the owners of two lots, in the town of Toppenish, and the defendants were the owners of a house and lot in the town of Bremerton. On that date, they entered into a written contract for the exchange of their properties. The agreement provided that each party should furnish to the other an abstract of title and, within ten days thereafter, clear up any defects in their titles.

The plaintiffs allege in their complaint that they delivered to the defendants an abstract of title to their property, and that such defects as the defendants pointed out have been cleared up by the plaintiffs, and that the defendants thereafter refused to comply with the contract. For answer, the defendants admitted the contract but denied that the plaintiffs delivered an abstract of title, and denied that the plaintiffs corrected the defects which were pointed out, and denied that the plaintiffs tendered performance.

Upon these issues, the case was tried to the court without a jury. When the plaintiffs had introduced their evidence in chief, the defendants asked leave of the court to amend the answer by alleging that the plaintiffs at no time had remedied the defects in their title, for the reason that it was incumbered by tax liens to the amount of more than $400; that they have been unable to remove these tax liens, and that the plaintiffs and the defendants agreed to rescind the contract for the exchange of the properties; that the defendants, acting upon that agreement to rescind, made material improvements upon their property, and by reason thereof were not required to complete the exchange. The plaintiffs objected to this amendment. The court ruled that it would not permit the amendment, except upon the imposition of terms, and would then continue the case to give the plaintiffs an opportunity to reply to the proposed amendment. The plaintiffs thereupon objected to the continuance, and the court permitted the amendment without terms.

After hearing all the evidence, the court found as facts that the contract had been entered into as alleged, and that the defendants had obtained an abstract of title to their property showing clear title in the defendants, and had executed a deed to the plaintiffs and offered to deliver the same to the plaintiffs upon the plaintiffs' paying the taxes due upon their property at Toppenish; that at that time the plaintiffs stated they could not pay the taxes, and that the parties thereupon agreed that the contract of exchange should be abrogated; whereupon the defendants returned the plaintiffs' abstract of title, destroyed the deed which the defendants had executed, and thereafter rented the property in Toppenish from the plaintiffs at a rental of $50 per month, and had paid that rental from that time on until the trial of the case. The court also found that the defendants, relying upon the verbal agreement to rescind the contract of exchange, had made improvements upon their property in Bremerton, and had entered into an agreement to mortgage the same to third

parties. Upon these findings, the trial court entered a decree rescinding the agreement and denying to the plaintiffs specific performance. The plaintiffs have appealed from that judgment.

The appellants argue, first, that the court erred in permitting the amendment to be made to the answer at the time it was allowed. The statute provides, at Rem. & Bal. Code, § 303 (P. C. 81 § 295):

"The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings . . ."

This court has frequently held that the power of the court to allow an amendment to a pleading is largely discretionary, and its exercise will not be reviewed except for abuse of that discretion. The authorities are cited in the foot notes to that section. We are satisfied there was no abuse of discretion in this case.

It is next argued that the court erred in refusing to grant the motion of the plaintiffs for judgment upon the pleadings. It is argued by the appellants that the pleadings show a readiness on the part of the defendants to make the exchange, and therefore the court should have enforced specific performance. We fail to find any such concession in the pleadings. The evidence upon the trial was that the defendants were ready and anxious to make the exchange at the time the verbal agreement to rescind was made; but, after that time, having made improvements upon their property and having leased the plaintiffs' property upon a month to month tenancy, that they were not then required, and did not then desire, to make the exchange. Under these circumstances, we are satisfied that the court properly denied the motion for judgment upon the pleadings.

It is next contended that the court erred in admitting certain depositions. The substance of these depositions is that the plaintiffs stated to these witnesses that the contract of exchange between the appellants and the respondents had

been rescinded. This was a material point in the case. It is argued by the appellants that the rescission was a verbal rescission, and that an oral rescission of a contract to purchase real estate is of no effect. The general rule seems to be that,

"An executory contract for the sale of land may be rescinded by mutual consent of the parties, either by novation or simple agreement, where they continue to occupy their original relations. And the agreement may be by parol as well as in writing, and may be implied as well as express." 39 Cyc. 1355.

However the rule may be in this regard, it is not necessary to determine in this case whether an executory contract for the sale of real estate may be rescinded by parol agreement. In the case of *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462, we said:

"While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary, it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by the statute to be in writing, can be successfully pleaded as a defense to an action on the original contract. To hold otherwise is to make the statute of frauds an instrument of fraud; for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation."

In this case, the trial court found, as a matter of fact, upon evidence amply sufficient, that, after these parties had mutually agreed to rescind the contract, they entered into a contract of lease from month to month for the Toppenish property, at the rate of $50 per month. Upon the strength of this agreement, the respondents went into possession of the property and paid the rent for a number of months.

Furthermore, the court found that, relying upon this oral rescission, the respondents made material improvements upon the property in Bremerton; and also had entered into a contract to borrow money thereon. It is too plain for argument that, under these circumstances, the appellants cannot now enforce the contract of exchange, because the respondents, relying upon the oral rescission, have made betterments upon their property and otherwise changed their position.

The last assignment of error is to the effect that the trial court should have entered an order requiring specific performance of the contract. From what we have said above, it follows that there is no merit in this contention.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 13034. Department One. May 6, 1916.]

CELIEVE BARTON, *an infant, by his Guardian Ad Litem etc., Appellant*, v. J. H. VAN GESEN, *Respondent*.[1]

PLEADING — AMENDMENT — AT TRIAL. Trial amendments being within the discretion of the court, under Rem. & Bal. Code, § 303, allowing amendments in furtherance of justice, it is not error, in an action for personal injuries, to allow an answer alleging contributory negligence by a boy on a bicycle to be amended by pleading an ordinance and alleging that the boy was exceeding the speed limit.

MUNICIPAL CORPORATIONS — ACCIDENT IN STREET — CONTRIBUTORY NEGLIGENCE—DEGREE OF CARE—CHILDREN. In an action for personal injuries sustained by a boy riding a bicycle and colliding with an automobile, an instruction as to the degree of care required by a child is sufficient where it is based upon the conduct of a reasonably prudent person of his age and capacity, using his faculties and powers of observation, having in consideration his age and experience; hence refusal of other instructions thereon is not error.

[1]Reported in 157 Pac. 215.

SAME—AUTOMOBILE ACCIDENT—WARNING. The driver of an automobile, turning slowly at a street intersection, is under no duty to sound a warning, where there was nothing upon the street, except boys approaching about a block away, and a warning would have been of no benefit to any person.

SAME—AUTOMOBILES—ORDINANCE — TURNING TO LEFT. Under an ordinance making it unlawful for any person while driving an automobile to occupy other than the right side of any street, except within the block at the point of destination, a person is within his rights, in turning at the center of the intersection of streets, to turn to his left to the place of destination.

SAME—AUTOMOBILE ACCIDENT — CONTRIBUTORY NEGLIGENCE — EVIDENCE—SUFFICIENCY. A boy riding a bicycle into the rear wheel of an automobile is guilty of contributory negligence which is the proximate cause of his injuries, where he was exceeding the speed limit and looking back, and could have avoided the accident if he had been looking in the direction he was going.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 27, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained in a collision with an automobile. Affirmed.

E. J. Lindberg and *Pruyn & Hoeffler*, for appellant.

E. E. Wager, for respondent.

MOUNT, J.—Action for personal injuries.

The plaintiff, a boy ten years of age, was injured in the city of Ellensburg on August 18, 1914, by riding a bicycle and striking an automobile driven by the defendant. The plaintiff alleges that the defendant was negligent in approaching a street intersection without sounding a warning; and also in turning to the left side of a street when he should have turned to the right. The defendant for answer denied the allegations of negligence, and alleged contributory negligence on the part of the plaintiff. Upon these issues, the case was tried to the court and a jury, resulting in a verdict and judgment in favor of the defendant. The plaintiff has appealed.

The facts, upon which there is little or no dispute, are as follows: Pearl street, in the city of Ellensburg, runs north and south. It is intersected by Third street, which runs east and west. At the time of the accident, about seven o'clock in the evening, the respondent was driving his automobile east on the right-hand or south side of Third street. He was approaching Pearl street. His destination was at the northwest corner of Third and Pearl streets. When he came to Pearl street driving on Third, he turned his automobile to the left at or about the manhole at the center of the intersection of those streets, and was going very slowly to his destination at the northwest intersection of those streets. At that time, three boys on bicycles were coming toward him, traveling west on the north or right-hand side of Third street, and at that time were about a block away to the east of Pearl street. The first boy, who was a little ahead of the plaintiff, passed to the rear of the respondent's automobile as it was moving to its destination. The plaintiff was not looking forward, but had turned his head to his left, and was looking backward. He ran his bicycle into the rear wheel of the defendant's automobile, and was severely injured.

Upon the trial of the case, without objection, the defendant introduced evidence to the effect that the plaintiff was traveling at a greater rate of speed than six miles per hour. At the close of the evidence, the defendant was permitted by the court to amend his answer by pleading an ordinance of the city of Ellensburg which prohibited the riding of bicycles within that district at a greater rate of speed than six miles per hour. The appellant contends this was error. This court has frequently held that an amendment of pleadings is within the discretion of the trial court. Rem. & Bal. Code, § 303 (P. C. 81 § 295); *Stoner v. Fryett*, *ante* p. 89, 157 Pac. 213. There is no merit in this contention.

The appellant contends, next, that the court erred in re-

fusing an instruction with reference to the degree of care required of a child of tender age. The court instructed the jury as follows:

"Of course, all of these things must be done to a reasonable extent, and as a reasonably prudent person of the age and capacity of the plaintiff here would naturally be expected to act under similar circumstances. And should you find that the plaintiff here was not using his faculties or powers of observation in a reasonable way, having in consideration his age and experience, and if he had been using the same in such manner the accident would not have happened or that his failure to use the same contributed in any material degree to the happening of the accident, and these things you believe by a fair preponderance of the evidence, then he cannot recover."

This instruction was proper, and all that was necessary. *Tibbitts v. Spokane*, 64 Wash. 570, 116 Pac. 397.

The plaintiff requested an instruction to the effect that the defendant was negligent in failing to toot a horn or give some signal of alarm upon entering Pearl street at its intersection with Third. The court refused this instruction, and we think properly; because, at the time the plaintiff entered Pearl street, he was driving very slowly, there were no vehicles upon that street, and nothing to require any signal of warning that he was about to approach that street. The accident happened after or about the time he passed off of Third street into Pearl street. The boys at that time were about a block away. They were coming toward him. There was nothing to indicate to him at that time that the boys were in any danger, or that there was any necessity for any warning signal when he entered that street. Furthermore, a warning signal would have been of no benefit to any person at that time.

It is argued that negligence of the defendant was shown, as a matter of law, because he turned his car to the left after he had come to Pearl street instead of keeping to the right-

hand side of that street. The ordinance of the city of Ellensburg upon this question provides:

"It shall be unlawful for any person while driving . . . any automobile . . . over or through any street or avenue in the city of Ellensburg to occupy other than the right side of any such street or avenue, except within the block in which is the point of destination." Ellensburg Ordinance No. 587, § 2.

It is plain from this ordinance that the plaintiff was within his rights when, after turning the center of the intersection of Pearl and Third streets, he turned to his left to the place of his destination. At the time of the accident, the defendant was well within his rights. He was either passing off, or had passed off, of Third street into Pearl street, and was either at his destination, or within a few feet thereof when his automobile was struck by the plaintiff.

It is also contended that the appellant is entitled to recover because of the negligence of the defendant. The jury found that the plaintiff was traveling in excess of six miles per hour, in violation of a city ordinance. It is conceded that before, and at the time, the plaintiff struck the automobile, he had his head turned in the opposite direction, and was not looking in the direction he was going. This fact was clearly the proximate cause of the injury. If the plaintiff had been looking ahead, he could have avoided the accident as the other boy did, even though he was traveling more than the lawful rate of speed. Under these conditions, we are at a loss to see how there can be any recovery, or how the verdict of the jury could have been other than it was.

Some contentions are made upon other instructions. We have carefully read all the instructions. They clearly state the law; and we are satisfied the appellant had a fair trial.

The judgment must therefore be affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 13061. Department One. May 6, 1916.]

A. G. MERRITT, *Respondent*, v. A. R. McLANE *et al.*, *Appellants*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of improper evidence is harmless in a case tried *de novo* on appeal.

VENDOR AND PURCHASER—CONTRACT—TIME FOR DELIVERY OF DEED. Where defendant admits that he was to furnish plaintiff a deed, although the contract failed to provide therefor, the court is justified in finding that he was to furnish a deed within a reasonable time.

SAME—CONTRACT—CONSTRUCTION — PERFORMANCE — REASONABLE TIME FOR DEED. Where defendants, being the holders of a contract for county lands which they had contracted to convey to N. & H., assigned the latter contract to plaintiff, the assignment reciting that the defendants would perfect title to the lands and pay the amounts due on the contract, and defendants admitted that they were to make deed to N. & H. (then in default) or to plaintiff if N. & H. failed to perform, the plaintiff is entitled to a deed from defendants within a reasonable time, and nine months after demand for a deed is such reasonable time.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered April 19, 1915, upon findings in favor of the plaintiff, in an action for breach of contract to convey real estate. Affirmed.

A. M. Murfin and *V. O. Nichoson*, for appellants.

J. J. Hays, for respondent.

MORRIS, C. J.—The facts in this case are somewhat complicated and it is difficult to make a brief and comprehensive statement of them. Prior to June 6, 1911, appellants were the holders of a contract for the conveyance of Benton county lands. On that date they entered into a contract to convey these lands to William Neighbors and E. T. Highfill. The consideration fixed in this contract was $2,500, of which $1,550 was paid in cash and the balance was to be paid in three installments: $400 June 1, 1912, $275 June 1, 1913,

[1]Reported in 157 Pac. 220.

and the remainder June 1, 1914, at which time, providing the payments had all been made, deed was to pass. On August 16, 1912, appellant assigned the Neighbors and Highfill contract to respondent. This assignment recited that $950 and interest was then unpaid upon the contract and that appellants agreed to perfect title to the lands and pay all claims necessary to obtain such title. It was further recited that "there is one payment of $300 and interest to be paid by said McLane;" evidently referring to the fact that such sum was due from appellants upon the contract under which they were to obtain title to the land. On the same day, respondent conveyed to appellants a house and lot at Grandview, the consideration being given as $1,600. This consideration was paid by a $100 note, the assumption of a $500 mortgage, the assignment of the Neighbors and Highfill contract, and the $950 due thereon. The remaining $50, it was stated on the oral argument, represented an interest balance. In the progress of their negotiations, McLane informed respondent, and it was then understood, that the $300 referred to in the assignment of the Neighbors and Highfill contract as unpaid on the purchase price by appellants would be due June 1, 1913. Respondent contends that it was understood as part of the transaction that he was then to receive a deed from appellants to the Benton county lands, while appellants contend nothing was said about a deed, except that if Neighbors and Highfill fulfilled their contract a deed would be given them. If they failed, a deed would be given to respondent. Sometime later, appellant discovered that the original contract of purchase did not call for a deed until June 1, 1914. On June 1, 1913, respondent demanded a deed from appellants. None was furnished. Repeated demands were then made up to February 18, 1914, when a written demand was made in which appellants were notified that, if a deed was not tendered within ten days, action would be commenced. The deed not being furnished, respondent commenced this

action on March 2, 1914, alleging failure to convey and praying judgment for $1,100.

On June 8, 1914, respondent filed a supplemental complaint alleging that Neighbors and Highfill had failed to make payments on their contract June 1, 1914, and that appellants still failed to perfect title to the land or vest respondent with title so that he was unable to make a sufficient demand on Neighbors and Highfill for a compliance with their contract. Appellants first filed a general denial for answer. On July 6th, a supplemental answer was filed, reciting that, on June 29th, appellants tendered a good and sufficient warranty deed to the Benton county lands to respondent, which was refused, which deed was then filed in the registry of the court for the benefit of respondent. In reply, respondent set forth that, at the time of the tender and refusal of the deed, the taxes for 1911, 1912 and 1913, amounting to $63.54, with interest and penalty, remained unpaid, together with water ditch maintenance and operation charges for the years 1909 to 1914, both inclusive, at $10 per annum, with six per cent interest thereon, due May 1st of each year. Respondent then filed with the court a cancellation of the Neighbors and Highfill contract, praying the court to enforce the same in the event of damages being awarded him. During the progress of the trial, it was discovered that one Stokes had become surety for respondent upon a $200 note, and held the Neighbors and Highfill contract as collateral security. The court thereupon continued the trial in order that Stokes might be made a party. Upon the trial being resumed, it was shown that the note upon which Stokes was surety had been paid and the collateral released. The court then found for respondent in the sum of $1,000; this sum representing the difference in value between the Grandview property and the $500 mortgage and the $100 payment made by appellants, and holding that, no time being mentioned in which a deed should be furnished respondent, the law would imply a reasonable time, and that such time had expired March 2, 1914.

Many errors are assigned, some on the admission of testimony by respondent that appellants agreed to give a deed June 1, 1913; but, since this is a trial *de novo*, the improper testimony has been rejected and we base our findings upon that which we deem admissible.

The main claim of error is that appellants were under no obligation to furnish a deed. The contract is silent as to a deed, and though we treat respondent's testimony concerning the time in which the deed was to be given as inadmissible and refuse to consider it, we have appellant A. R. McLane's testimony that he told respondent he would furnish a deed, either to him or to Neighbors and Highfill, depending upon whether or not Neighbors and Highfill fulfilled their contract. Neighbors and Highfill had not fulfilled their contract, and were in default at the time of the transaction between appellants and respondent. Since, then, appellant admits that he was to convey to respondent in the event of the default of Neighbors and Highfill, there is evidence in the record to which appellants can take no exception that there was an understanding between the parties as to a deed to respondent at sometime; and this being so, the lower court was justified in finding that such time was within a reasonable time.

Bearing upon this point, it further appears that, subsequent to respondent's demand for a deed on June 1, 1913, appellants endeavored to obtain a deed from the then owner of the land. The rights of respondent are to be determined not only by the contract from appellants, but also by the contract between appellants and Neighbors and Highfill, since it was appellants' rights and interest under this later contract that were assigned to him. While these contracts are meager and inaptly drawn, it is apparent that the parties to them contemplated title in appellants, which in the Neighbors and Highfill contract appellants bound themselves to convey by good and sufficient deed to Neighbors and Highfill. It comes with poor grace from appellants for them to say that

they have passed all the benefits coming to them under the Neighbors and Highfill contract but had retained all of its burdens. Respondent could not enforce a forfeiture against Neighbors and Highfill without a tender of a deed, and it does not seem to us that it was within the contemplation of the parties that a mere naked and unenforcible right was being assigned. Appellants were in no position to enforce the Neighbors and Highfill contract, since they had parted with their interest; so that, without a deed to respondent, no one was in a position to enforce it to the extent of a forfeiture. We hold with the lower court, based upon appellants' own testimony and the intendment of the two contracts, that, at the time of the transaction with respondent, it was understood that appellants were to vest respondent with title to the Benton county lands; and not having fixed any time within which to do so, the law fixes a reasonable time, and such time expired prior to March 2, 1914.

The lower court, being invested with full jurisdiction in the premises, correctly ruled in ordering a reassignment of the Neighbors and Highfill contract.

No prejudicial error arises out of the Stokes matter.

Fault is found with the valuation of the Grandview property at $1,600. The value being fixed by the parties, we will not disturb it.

The judgment is affirmed.

Mount, Ellis, Bausman, and Chadwick, JJ., concur.

[No. 13071. Department One. May 6, 1916.]

WILLIAM W. BOEHME, *Respondent*, v. BROADWAY THEATER COMPANY, INCORPORATED, *et al.*, *Appellants*.[1]

CORPORATIONS—SALE OF STOCK—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. The rescission of a sale of corporate stock of a moving picture concern for fraud is warranted, where the preponderance of the evidence supported the claim of the plaintiff, a young man 24 years of age without business experience, that the defendants, officers and principal stockholders of the company, falsely represented that the company was making money above expenses and had for eight weeks, when in fact it had always lost money, that its lease called for monthly rentals of $150 to $200 a month, when in fact it called for $250 per month, and that plaintiff relied on the representations and was induced thereby to purchase stock.

SAME — SALE OF STOCK — FRAUD — RELIANCE UPON — MATTERS OF FACT. A sale of stock in a corporation may be rescinded for false representations as to its financial condition, the volume of its business and the amount of its income and expenses being matters of fact peculiarly within the knowledge of the officers of the company making the same, even though there was an opportunity to investigate.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 4, 1914, upon findings in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

Wm. Martin and *Hugh C. Todd*, for appellants.

Jay C. Allen and *F. P. Rutherford*, for respondent.

ELLIS, J.—Action to rescind a contract of purchase of one-third of the capital stock of a moving picture concern, known as the Broadway Theater Company, Incorporated; to recover $1,400 paid on the purchase price; to procure the cancellation of a note for $350 representing the balance; to recover wages claimed to be due to plaintiff from the corporation; and incidentally for the appointment of a receiver.

[1]Reported in 157 Pac. 218.

The court found that the defendants Faurot and Hubachek, the president and secretary, respectively, of the corporation and owners of practically all of its stock, for the purpose of inducing the plaintiff to make the purchase, falsely and fraudulently represented that the theater company was making money above expenses, had made money for eight consecutive weeks immediately prior to plaintiff's purchase in July, 1914, and had never lost any money during the entire nineteen weeks of its business career, and that all of its obligations were paid except the sum of $1,700; that they also represented that they held a five-year lease of the theater premises at a monthly rental of $150 for six months of each year and $200 a month for the winter months, whereas the lease called for the sum of $250 for each and every month; that, relying upon these representations and the verbal promise of defendants that he should be given steady employment as moving picture operator at $21.25 a week, plaintiff purchased the stock for $1,750, paid $1,200 down, and gave his two notes, one for $200, payable in ten days, which has been paid, and one for $350, payable October 1, 1914; and that the contract provided that the purchase money should be all applied on the indebtedness of the corporation, but that defendants did not so apply it; that plaintiff paid the first note prior to his discovery of the fraud, and that, upon such discovery, he tendered to defendants a return of the stock and demanded of them a return of the money paid therefor and of the unpaid note.

Upon appropriate conclusions of law, the court decreed a rescission of the contract and the cancellation of the note for $350, entered judgment for plaintiff against all of the defendants for $1,400, with interest from August 1, 1914, and costs, and against the theater company for $221.80 for services rendered by plaintiff, and appointed a receiver for the corporation. Defendants appeal.

As we view the case, it involves but two questions, both of them questions of fact. Did the appellants misrepresent the

volume of the business and the financial condition of the theater company; and did respondent purchase the stock in reliance thereon? In short, does the evidence sustain the court's findings?

We have read all of the evidence, but can discuss no more than its salient features within the reasonable limits of an opinion. Appellants Hubachek and Faurot were both men of affairs, though neither of them prior to this venture was experienced in the moving picture business. Respondent was a young man, twenty-four years old, with practically no business experience. The money invested represents about all that was left of an inheritance from his deceased father. His mother, who assisted him in this deal, advised appellants of these facts, and told them that she and the boy must rely upon their statements as to the condition of the business. Both she and the young man testified that appellants made the representations in substance as found by the court, but with much more particularity. Appellants denied that they made any such representations, but on cross-examination one of them admitted that he told respondent that, during the nineteen weeks of their operation, the current running expenses and current receipts for attendance were approximately the same. The other appellant, when asked what representations he had made in regard to the daily receipts and average current expenses, answered, "I said at the time that I thought they were breaking even, or nearly so." True, he also testified that he gave the respondent the actual items, which respondent took down on a piece of paper, and which, if taken down correctly, he testified would have shown that the expenses exceeded the receipts, but respondent denied this incident in toto. One of the agents through whom the sale was negotiated, though at first denying that he heard the appellants represent that the company had been making money, finally admitted that he had made an affidavit that, prior to the completion of the sale, he understood the president of the company to state and represent to respondent and his mother

that "for eight consecutive weeks previous thereto the theater had been making money and was on a paying basis." He was apparently an unwilling witness and attempted to qualify this statement, but admitted that, before signing the affidavit, he had revised it to make it accurately state his recollection of the facts. It is now conceded that, at the time of this transaction, the business was not only not making money but was steadily running behind, and the evidence clearly establishes the fact that never at any time throughout its career was the business on a paying basis. For one or two isolated weeks, the income may have exceeded the expenses, but on the whole the business throughout had been a losing one. The representations, even as admitted by the appellants, clearly lacked basis in fact.

We shall not discuss in detail the evidence touching the representations as to the lease. It must suffice to say that the representation as found was actually made, and though one of the appellants claims that he then advised respondent that this was a mere concession from the terms of the lease, we think that the evidence clearly preponderates in favor of the conclusion that neither of the appellants advised respondent that the lease bound the company to pay $250 a month throughout the term and that neither showed him the lease itself. The agreement to pay respondent $21.25 a week was practically admitted.

As to the appellants' claim that the respondent and his mother made an independent investigation of the affairs of the company, the evidence shows no more than that they visited the theater one night, observed the attendance, and afterwards stated to each other and to appellants that on such an attendance they could not see how the concern could be making money. Both of them admitted that this is true, but testified that appellants told them that the attendance was light because it was Potlach time and because the weather was hot. One of the appellants testified that he showed the books to respondent's mother and offered to permit an exami-

nation. Respondent and his mother both denied that they ever saw the books, and the evidence is convincing that neither of them ever entered upon any specific investigation of the condition of the company, but that they relied almost entirely upon the statements of appellants and that appellants knew that they were so relying. Upon the whole, we are clear that the evidence strongly preponderates in favor of the facts as found by the court.

The claim that whatever representations were made by appellants were mere expressions of opinion upon which respondent had no right to rely is untenable. The financial condition of the company, the volume of its business, the amount of its income and expenses, and what these had been in the past, were all matters peculiarly within the knowledge of the appellants and not easily ascertainable by respondent. We have frequently held that representations as to such matters are representations as to matters of fact, and if false and made with knowledge that they were being relied upon by the other party, constitute actionable fraud. *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114; *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183. The following decisions of this court rest upon facts of a kindred nature to those here presented, and amply sustain the decision of the trial court upon the facts here involved: *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Jacoby v. Hollada*, 78 Wash. 88, 138 Pac. 558; *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149; *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33; *Gillette v. Anderson*, 85 Wash. 81, 147 Pac. 634; *Randolph v. Togus*, 85 Wash. 332, 148 Pac. 5; *Hayes & Porter v. Wood*, 86 Wash. 254, 150 Pac. 1. The governing principle as sustained by the trend of modern authority and by all of the more recent decisions of this court is tersely stated in *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585, as follows:

"Ordinary prudence does not require a person to test the truthfulness of representations made to him by another as of his own knowledge with the intent that they shall be believed and acted upon, even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself."

Upon the record before us, we find no warrant, either in evidence or law, for a reversal of the judgment. It is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13199. Department One. May 6, 1916.]

PUGET SOUND IRON & STEEL WORKS, *Appellant*, v. FIRST INTERNATIONAL BANK, *Respondent*, ELI ROCKEY *et al.*, *Defendants*.[1]

TRIAL — PROVINCE OF COURT AND JURY — DIRECTING JUDGMENT — GARNISHMENT. Where, in garnishment proceedings, there is substantially no dispute on any of the facts, the court is warranted in taking an issue from the jury and directing judgment.

APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. Upon an appeal by plaintiff from a judgment in garnishment limiting his recovery, error in refusing to dismiss the garnishment cannot be urged by garnishees who did not appeal.

GARNISHMENT—JUDGMENT—ATTORNEY'S FEES — STATUTES. Under Rem. & Bal. Code, § 704, allowing costs and reasonable attorney's fees against plaintiff to a garnishee who is discharged upon his answer, and against defendant if the garnishee is held, with costs to abide the result if the answer is controverted, attorney's fees are properly allowed against plaintiff where the answer was controverted and the court found substantially in accordance with the answers.

Appeal from a judgment of the superior court for Pacific county, Clifford, J., entered April 24, 1915, in favor of the defendants by direction of the court, after a trial before the court and a jury, in garnishment proceedings. Affirmed.

[1]Reported in 157 Pac. 212.

Fred M. Bond, for appellant.

Lockerby & Couden, for respondent.

MOUNT, J.—This is a garnishment proceeding. It appears that the Puget Sound Iron & Steel Works began an action against Eli Rockey and wife to recover the sum of $2,329. On bringing the action, they sued out a writ of garnishment which was served upon J. A. Soderberg and the First International Bank. Mr. Soderberg, in answer to the writ of garnishment, denied that he was indebted to the defendants Rockey, or had any property under his control belonging to them, except that, on or about November 1, 1913, he executed a negotiable note payable to the order of Eli Rockey in the sum of $3,945, due ninety days after date, which note was not delivered to Mr. Rockey, but was placed in escrow with the First International Bank of South Bend, Washington; that the condition of the escrow was that Mr. Soderberg had purchased certain real property from Mr. Rockey; that, when the title to the property was cleared up to the satisfaction of Mr. Soderberg, the note was then to be delivered by the bank to Mr. Rockey.

The First International Bank answered the writ to the effect that it had in its possession the sum of $3.29, being a balance of a banking account of Mr. Rockey; and further answered that, on November 1, 1913, Mr. Soderberg entered into an escrow agreement with the Rockeys, by the terms of which Mr. Soderberg made and executed his promissory note for the sum of $3,945, with interest from date at the rate of eight per cent, payable to Eli Rockey; that the conditions of the escrow agreement were that Soderberg had agreed to purchase certain real estate from the Rockeys, and that the bank had agreed to hold the note until the title was cleared up to the satisfaction of Mr. Soderberg, and upon this being done, the note was to be delivered to Mr. Rockey. The bank answered further, that, after the note had been placed with it under these circumstances, Mr. Rockey had agreed that

when the note became subject to delivery by the bank, it should take therefrom all except $1,000 to apply upon a debt owing by Mr. Rockey to the bank.

The Puget Sound Iron & Steel Works thereupon controverted the answer of both Soderberg and the bank. Upon these issues, the case was tried to the court and a jury. At the conclusion of all the evidence, the trial court discharged the jury and entered a judgment to the effect that, when the Rockeys had perfected the title to the real estate sold to Mr. Soderberg, the bank should receive out of the proceeds of the note all thereof except the sum of $1,000, and that what was left of this $1,000, after the expenses of clearing the title to the real estate had been paid, should be applied in satisfaction of the judgment obtained by the Puget Sound Iron & Steel Works against Eli Rockey and wife. The court further ordered that the bank should recover its costs amounting to $40. The plaintiff has appealed from that judgment.

The appellant contends that the court erred in not submitting the question of fact to the jury whether the promissory note executed by Soderberg was held in escrow until the title to said property was cleared up by Mr. Rockey; and erred in not submitting to the jury the question of fact whether the bank had a lien or pledge upon the note. It is contended by the appellant that there was sufficient evidence in the record to be submitted to the jury upon those questions. We have carefully read the entire evidence in the record and are satisfied that the court was clearly right in not submitting these questions to the jury. There was substantially no dispute upon the facts. The evidence is clear to the effect that Mr. Soderberg had purchased several tracts of real estate from Mr. Rockey; that the purchase price had all been paid except the amount of this note. There was some question about the title to some of the property. Mr. Soderberg had executed his note for the balance due upon the purchase price, namely, $3,945. It was thought that the title to the real estate could be perfected within ninety days, and for that

reason the note was made a ninety-day note. It was agreed between Soderberg and Mr. Rockey that the note should be left in escrow with the bank until the title of the real estate should be cleared up to the satisfaction of Mr. Soderberg and his attorneys. Mr. Soderberg was to have credit upon the note for all his expenses in clearing the title. The note was placed in escrow with the bank, to be delivered to Mr. Rockey when the title was cleared up, and was to be credited with the amount of the expenses which Mr. Soderberg was put to in making good title to the real estate. At the time of garnishment the note had not been delivered to Mr. Rockey, and he was not entitled thereto. It was held by the bank in escrow, and was only to be delivered after the title of the real estate had been completed. At the time of the trial, Mr. Rockey was not entitled to the possession of the note. It was still in the bank. The title to the real estate had not been cleared. After the note was delivered to the bank, and before the writ of garnishment was served, Mr. Rockey agreed with the bank that all except the sum of $1,000 should be held by the bank when the note was paid, to apply on the debt which was owing by him to the bank. It was estimated by all the parties to the transaction that this $1,000 would be sufficient to clear up any defects in the title to the real estate. There was no substantial dispute of any of these facts; and upon them we are satisfied that there was nothing for the jury to determine. The only question was one of law.

The respondent insists that the court erred in not dismissing the garnishment proceeding. It is claimed that, under the authorities, the note or the proceeds thereof were not subject to garnishment under the facts above stated. Conceding this is the rule, no appeal was taken by the respondents from the judgment entered, and, consequently, they are in no position to urge that contention.

It is argued by the appellant that the court erred in assessing costs in favor of the bank. The statute provides at Rem. & Bal. Code, § 704 (P. C. 81 § 525), as follows:

"Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee for attorneys' fees, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon such costs shall be taxed against the defendant and included in the judgment. Where the answer is controverted the costs shall abide the issue of such contest."

The answers were controverted here, and the court found substantially in accordance with the answers. It seems plain, therefore, that, under the provisions of the statute, the answering garnishees were entitled to their costs, because their answers were not only sustained, but the issues decided by the court were in favor of the garnishees.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 13245. Department One. May 6, 1916.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v. WILLIAM McDONALD, *Appellant*.[1]

PUBLIC LANDS—GRANT TO RAILROAD—RIGHT OF WAY—NATURE—RELATION. Act of Congress of July 2, 1864, granting a right of way to the Northern Pacific Railroad Company over public lands is a grant *in praesenti*, taking effect by relation as of that date, upon definite location of the line, as against settlers acquiring public lands after the grant and before the location of the line.

ADVERSE POSSESSION—RAILROAD RIGHT OF WAY—PERMISSIVE USE. The mere occupation of a portion of a railroad right of way by the owner of the servient estate does not create title by adverse possession, since it is not inconsistent with the easement and will be construed as permissive.

Appeal from an order of the superior court for Benton county, Linn, J., entered September 11, 1915, in favor of

[1]Reported in 157 Pac. 222.

the plaintiff, denying a motion to vacate a default judgment. Affirmed.

H. Dustin, for appellant.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte*, for respondent.

MOUNT, J.—This appeal is from an order of the superior court refusing to vacate a default judgment. When the motion came on to be heard, it was agreed by counsel that, unless the defendant's petition set forth a valid defense to the plaintiff's complaint, there would be no necessity for vacating the default judgment. The trial court was of the opinion that the answer of the defendant to the complaint was insufficient, and therefore refused to vacate the judgment. This appeal is from that order.

It appears that the plaintiff brought the action to eject the defendant from a certain portion of the right of way of the railway company, alleging in substance that, by an act of Congress dated July 2, 1864, the land was granted to the railway company for a right of way; that, pursuant to that act, the railway company definitely located and constructed its railway across the land; that the defendant unlawfully and wrongfully trespassed upon the plaintiff's right of way and took possession of a part thereof, describing it. It prayed for a judgment for the recovery of the premises and for the reasonable rental of the land.

For answer, which was tendered in the petition to vacate the default, the defendant admitted the grant by Congress; and admitted that, between the years 1884 and 1885, the railway company filed its map of definite location, and denied that, by reason thereof, the railway company became the owner of the land. He then, for a further answer, alleged that, in May, 1883, prior to the filing of the map of definite location, one Michael A. Ward filed a preemption on the land in dispute; that afterwards, in May, 1890, he changed

his preemption claim to a homestead entry, filed upon the land at said time, and continued to reside thereon until the 23d day of March, 1902, when he received a patent from the United States government; that the railway company unlawfully appropriated the land without authority; that on May 4, 1903, Michael A. Ward conveyed the land to the defendant; that the defendant went into possession, and has ever since remained in possession of the land, excepting a strip used by the railway company as a roadbed for its railway. In an amended answer which the court permitted to be filed, the same facts are alleged, except that it is alleged that Michael A. Ward entered the land prior to the date of the filing of the map of definite location by the railway company, but does not allege that Ward's entry is prior to the right of way grant of July 2, 1864.

This court has held in *Northern Pac. R. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909, that the act of Congress of July 2, 1864, granting a right of way to the Northern Pacific Railroad Company over public lands, is a grant *in praesenti*, taking effect by relation as of that date, upon definite location of the line, as against settlers acquiring public lands after the grant and before the location of the line. See, also, *Northern Pac. R. Co. v. Concannon*, 239 U. S. 382; *Northern Pac. R. Co. v. Tuttle*, 89 Wash. 699, 154 Pac. 796.

It is plain, therefore, that neither Mr. Ward nor the defendant acquired any title to the right of way of the Northern Pacific Railway Company by filing a preemption or homestead claim thereon subsequent to the act of March 2, 1864.

The appellant apparently makes no claim of adverse possession. But even if he did, that claim would be unavailing under the following authorities: *Northern Counties Inv. Trust v. Enyard*, 24 Wash. 366, 64 Pac. 516; *Northern Pac. R. Co. v. Concannon, supra; Northern Pac. R. Co. v. Ely*, 197 U. S. 1; *Northern Pac. R. Co. v. Hasse*, 197 U. S. 9.

Under these authorities, the answer did not state a defense, and the order appealed from is therefore affirmed.

MORRIS, C. J., ELLIS, BAUSMAN, and CHADWICK, JJ., concur.

[No. 13262. Department Two. May 6, 1916.]

FLORENCE V. BROWN, *Appellant*, v. THE CITY OF WALLA WALLA, *Respondent*.[1]

NEW TRIAL—GROUNDS—MISCONDUCT OF JUROR. The denial of a new trial for misconduct of a juror is a proper exercise of the discretion of the trial court, where upon disputed facts, the evidence preponderates in favor of the ruling.

APPEAL—RECORD—REVIEW—ABSTRACTS. In the absence of an abstract of the evidence, the court will not examine a voluminous record to determine whether instructions complained of were erroneous as applied to the facts, where they correctly stated abstract principles of law.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered October 22, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

Marvin Evans and *F. A. Garrecht*, for appellant.

J. P. Neal (Sharpstein, Pedigo, Smith & Sharpstein and *John A. Laing*, of counsel), for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, claimed by the plaintiff to have resulted to her from the negligence of the defendant city in failing to properly guard one of its streets while in the process of being improved. Trial in the superior court for Walla Walla county resulted in verdict and judgment in favor of the city, from which the plaintiff has appealed to this court.

It is first contended in appellant's behalf that she is en-

[1]Reported in 157 Pac. 30.

titled to a new trial because of the misconduct of a juror during the trial and the deliberations of the jury. Viewing this contention as having to do only with the questions of fact as to whether or not the acts charged against the juror were committed by him, we are of the opinion that the evidence, consisting of affidavits and counter affidavits bearing thereon submitted to the trial judge, warranted him in regarding such evidence as preponderating against the claims of counsel for appellant as to misconduct on the part of the juror. We are clearly of the opinion that the denial of appellant's motion for new trial, so far as this ground thereof is concerned, was a proper exercise of the discretion vested in the trial court.

Numerous errors are assigned upon the instructions given to the jury by the court upon the trial of the case. As presented to us, these instructions involved little else than abstract questions of law, that is, whether or not they are correct or erroneous when so viewed. Counsel for appellant have not presented to us in their abstract of the record any of the testimony touching the merits of the case, giving us therein only the facts relating to the alleged misconduct of the juror. In view of the fact that the evidence touching the merits of the case covers some three hundred typewritten pages, we do not feel called upon to examine it with a view of ascertaining whether or not any of the instructions complained of are erroneous as applied to this particular case. We are of the opinion that the instructions complained of state the law correctly, and pertain to questions apparently within the issues as disclosed by the pleadings. This brief disposal of counsel's contentions relating to the court's instructions is in keeping with the manner of presentation thereof in their brief.

The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13007. Department Two. May 9, 1916.]

NORTHWESTERN EQUIPMENT COMPANY, *Appellant*, v. ELMER SOFE *et al.*, *Respondents*.[1]

DAMAGES—EVIDENCE—SUFFICIENCY—NOMINAL DAMAGES. In an action for damages to a new concrete mixer, except the boiler and certain parts that were placed in a warehouse, evidence of the difference between the market value of the machine including the parts in the warehouse at the time it was taken, and its market value when returned, is insufficient to show the damage, or to entitle plaintiff to more than nominal damages, there being no evidence of the value as it stood at the time it was taken without the parts stored in the warehouse, or of the value of such parts, from which the damages might be ascertained.

Appeal by plaintiff from a judgment of the superior court for King county, Mitchell, J., entered January 15, 1915, in favor of the plaintiff for nominal damages, in an action in tort, tried to the court. Affirmed.

Ellis de Bruler, for appellant.

Sullivan & Christian, for respondents.

MAIN, J.—The purpose of this action was to recover damages which were alleged to have been caused by the defendants to a concrete mixing machine. The cause was tried to the court without a jury. At the conclusion of the plaintiff's evidence, as to part of the defendants, a motion was made that the cause be dismissed, except with nominal damages; as to the others, a motion was made for a judgment of dismissal and nonsuit without reference to nominal damages. The trial court thereupon dismissed the cause as to the defendant McConaghy, and entered a judgment for $1 against all other defendants. From this judgment, the plaintiff appeals.

The facts are these: On May 4, 1911, and for some time prior thereto, the appellant was engaged in the business of

[1]Reported in 157 Pac. 459.

selling machinery, at Seattle, Washington. The machinery which it kept on hand for sale was ordinarily stored in the warehouse of the Globe Transfer Company at 530 First avenue south, in that city. On or about the date mentioned, the appellant received one new concrete mixer, which it caused to be placed on a lot on the west side of First avenue south, near Holgate street. The boiler and certain parts of the engine were placed in the warehouse. The mixer remained in the location where it had been placed until about September 20, 1913. On this date it was removed therefrom by McConaghy, who was engaged in the transfer business, and who, in removing the machine, was acting under the direction of the defendant Sofe, who assumed to be the owner. Sofe claimed to have purchased the machine from one Murphy. Thereafter, after being transferred to the defendant Levine, it was sold by Levine to the defendants Waterman, McHugh, and Creelman. These parties removed the machine to Sedro Woolley, where for a period of about seven months they used it in mixing concrete.

The appellant, after discovering that the machine had been removed from its location, instituted a search for the same, and finally found it in possession of Waterman, McHugh, and Creelman at Sedro Woolley. Thereupon demand was made for its return. This demand was complied with by the return of the machine to the appellant.

Upon the trial, the evidence introduced on behalf of the appellant showed that the market value of the machine at the time it was taken, including the parts which were in the warehouse, other than the boiler, was $1,250; and that its market value at the time of its return was $450. There is no evidence of the market value of the machine as it stood at the time it was taken, without the parts which had been removed from the engine and stored in the warehouse. Neither is there any evidence of the market value of these parts. Without evidence as to the market value of the machine as it stood at the time it was taken, or evidence of the

market value of the parts in the warehouse, from which it could be mathematically determined what the value of the machine was, the amount of damages which the appellant would be entitled to cannot be ascertained, unless the parts which were in the warehouse were of no value. The evidence fails to show that such parts were of no substantial value, but rather affirmatively shows the contrary.

The local agent, while testifying in the case, was asked what the market value of the machine alone was as it stood at the time it was taken, without the parts which were in the warehouse, and replied: "I cannot tell you off-hand." The evidence not being sufficient to enable the court to measure the damage which the appellant was entitled to, it would have a right to a judgment for nominal damages only.

Reference has been made to the case of *United Iron Works v. Hurley Mason Co.*, 71 Wash. 275, 128 Pac. 209. But that case is distinguishable from this. In that case the evidence showed the market value of the machinery at the time it was taken, and the market value at the time it was returned, from which evidence the amount of the damages could be measured. While in this case, as already stated, from the evidence in the record, the amount of the damages could not be ascertained. The facts in this case, as presented in the record, show no cause which would justify a reversal of the judgment.

The judgment will therefore be affirmed.

HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

[No. 13015. Department Two. May 9, 1916.]

C. A. KILBOURNE *et al.*, *Appellants*, v. J. W. RATHBUN, *Respondent*.[1]

PARTNERSHIP—SETTLEMENT—ACCOUNTING—NECESSITY. Where one of two concerns that had been doing business as partners ceased to do business and gave a demand note for the amount of a balance struck, assigning all accounts as collateral security, the other partner may sue on the note as upon a settlement without the necessity of an accounting.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 1, 1915, upon findings in favor of the defendant, dismissing an action on a promissory note, tried to the court. Reversed.

E. L. Skeel and *W. M. Whitney* (*J. J. Geary*, of counsel), for appellants.

Byers & Byers, for respondent.

MAIN, J.—The purpose of this action was to recover a balance alleged to be due upon a promissory note. The plaintiffs were copartners doing business under the firm name and style of Seitzick & Company. The defendants were alleged to be partners doing business under the firm name of Rathbun-Speer Company. Speer was not served with process, and the action proceeded against Rathbun alone. In the answer, the execution of the note is admitted, the balance alleged to be due is denied, and, by way of cross-complaint, damages are sought to be recovered against the plaintiffs. The allegations of the cross-complaint are controverted by the plaintiffs. The cause was tried to the court without a jury, and resulted in the denial to the defendant of his claim for damages, and a dismissal of the action as to the plaintiffs. From this judgment, the plaintiffs alone appeal.

The facts necessary to an understanding of the question in

[1]Reported in 157 Pac. 457.

the case are these: During the year 1912, the appellants were doing a wholesale brokerage business in butter and eggs, with offices in the Epler building in Seattle, Washington. Rathbun was a commission merchant or wholesaler engaged in selling butter and eggs and other articles, with a place of business on Western avenue, in Seattle. The first business transactions between the appellants and Rathbun occurred probably during the month of September, 1912, when the appellants delivered to him a carload of eggs to be sold, the profits thereof to be equally divided. Thereafter, from time to time, other transactions occurred of a similar character. A number of times when Rathbun was in need of funds to carry on his business, the necessary money was advanced by the appellants. In the manner indicated, the business continued until some time during the early part of the year 1913. At that time the appellants Rathbun and Speer had some negotiations or talk relative to the formation of a corporation to be known as the Rathbun-Speer Company. Articles of incorporation were drawn, but were never filed. Consequently no corporation ever came into existence.

After the time when the discussion relative to the corporation took place and the articles were drawn, Rathbun moved his place of business to another and supposedly better location, and thereafter did business under the name of Rathbun-Speer Company. Speer's part in the business was that of a traveling salesman, the greater portion of his time to be devoted to the Alaska trade.

During the year 1912, the appellants furnished butter and eggs to the Rathbun-Speer Company for sale. In order to carry on the business of the latter company, it was necessary that it be loaned credit or aided financially by the appellants. The appellants kept close track of the business of the Rathbun-Speer Company, having their bookkeeper make a statement to them from the books of the latter company approximately once a month, and sometimes more frequently.

The parties continued to do business until some time during

the early part of the year 1914. On March 7, 1914, the Rathbun-Speer Company, by J. W. Rathbun, manager, executed and delivered to the appellants a demand note for the sum of $4,466.61, with interest at seven per cent per annum. At the time the note was executed, the Rathbun-Speer Company had ceased to do business. As collateral security for the payment of the note, substantially all the accounts due the Rathbun-Speer Company were assigned to the appellants. The note recites that these accounts are assigned "as collateral security for the payment of this note." After the accounts had been assigned and the note executed and delivered, Rathbun collected money upon the accounts from time to time, and turned it over to the appellants in accordance with the understanding of the parties. The appellants, in turn, gave Rathbun credit for the money thus collected and turned over, upon the debt evidenced by the note. There is no controversy over the amount of money thus collected and paid over. At the time the action was begun, there was a balance due upon the note of $1,385.93.

If the judgment of the trial court can be sustained, it is only upon the theory that a partnership relation existed during the year 1913 between the appellants, Rathbun, and Speer, and that to adjust the rights of the parties recourse must be had to an action for an accounting. On the other hand, if the appellants are entitled to prevail upon this appeal, it is because either, first, that no partnership relation existed between the four parties mentioned; or second, if such relation did exist, then there was a settlement and adjustment of the partnership affairs at the time the accounts were assigned and the note executed.

It will be assumed, though we think the fact otherwise, that a partnership relation did exist during the year 1913 between the four parties mentioned. Assuming the existence of such a partnership, was there a settlement and adjustment of the partnership affairs which rendered an accounting unnecessary? The law is that, where partners have agreed upon

a settlement and struck a balance, the settlement is binding, and may be made the basis of an action without resort to an action for an accounting. Gilmore, Partnership, p. 479, § 159; Parsons, Partnership (4th ed.), § 193; *Wycoff v. Purnell*, 10 Iowa 332; *Hanks v. Baber*, 53 Ill. 292.

In this case, the Rathbun-Speer Company had ceased to do business, substantially all of the accounts of that company had been assigned to the appellants, and a balance had been struck and a note executed for the amount of such balance. Under the rule of law stated, the appellants had a right to maintain the action upon the note.

It is claimed, however, by Rathbun, that his signature to the note was surreptitiously secured. We find no evidence in the record which would justify the conclusion that Rathbun, at the time he executed and delivered the note, was overreached, or that any fraud was practiced upon him. He admits signing the note, and knowing at the time the character of the instrument that he was executing. He claims, however, that the note was given to secure the assignment of the accounts. In this his testimony is not in accord with the recital in the note that the accounts are assigned as collateral security for the payment of the note.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment for the balance of the principal due upon the note, together with interest thereon at the rate of seven per cent per annum.

Judgment reversed.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

[No. 13073. Department Two. May 9, 1916.]

S. E. DONAHUE, *Respondent*, v. HARDMAN ESTATE, *Appellant*.[1]

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. In an action to recover possession of personal property, the amount in controversy governing the jurisdiction on appeal is the value alleged in the complaint and not the amount recovered.

FIXTURES—TENANT—RIGHT OF REMOVAL—SURRENDER. An assignee of the tenant must exercise the right to remove trade fixtures before surrendering the lease.

SAME—MORTGAGEE OF TENANT—RIGHT OF REMOVAL. After surrender of the premises by the tenant, a mortgagee of trade fixtures cannot remove them.

FIXTURES—TENANT—HOTEL EQUIPMENT—ATTACHMENT TO BUILDING. The law of fixtures applies as between tenant and landlord, where tenants installed window shades attached to the building in the ordinary manner, towel hangers actually attached with screws, and medicine cabinets attached by boring holes in the wall and putting in a block to which the chests were attached by screws.

FIXTURES—SALE—BILL OF SALE—RESERVATIONS OF TITLE. A bill of sale of hotel furnishings made by the owner of the hotel, reciting that it is understood that the sale does not affect the title to "any fixtures attached to the building," accompanied by a receipt stating that the owner retains title to specified equipment "and any other fixtures attached to the building," shows clearly that the owner reserved title to the fixtures attached to the building.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 1, 1915, upon findings in favor of the plaintiff, in an action to recover personal property, tried to the court. Reversed.

Reed & Hardman, for appellant.

J. D. Bauer, for respondent.

MAIN, J.—This action was brought for the purpose of recovering possession of certain personal property, or in lieu thereof its reasonable value. The property described in the

[1]Reported in 157 Pac. 478.

complaint is one hundred and ninety-six window shades, seventeen fire extinguishers, thirteen fire gongs, one hundred and twenty-five towel hangers, two electric signs, thirty feet of brass railing, two Vienna chairs, one loose leaf ledger, one pair of andirons, one gas log, one hundred and twenty-four medicine cabinets, sixteen garbage cans, and brass nosing on stairs, which property was alleged to be of the value of $675.60. Subsequent to the filing of the complaint, a bill of particulars was furnished by the plaintiff to the defendant. In this bill of particulars, claim to the seventeen fire extinguishers is relinquished. After eliminating the fire extinguishers, the reasonable value of the property, under the allegations of the complaint, would be $540.10.

In the defendant's answer to the complaint, it claims to be the owner of all the property described therein and for which the action was brought. The cause was tried to the court without a jury, and resulted in findings and conclusions and a judgment awarding to the plaintiff possession of one hundred and twenty-one medicine cabinets, one hundred and twenty-five towel hangers, and one hundred and thirteen window shades, and in lieu thereof, if possession be not surrendered, a judgment for $95.60. From this judgment, the defendant appeals.

The facts which gave rise to the litigation are substantially as follows: During the year 1909, the appellant being then the owner of a certain lot in the city of Seattle and the building thereon, known as the Wilhard hotel, leased the same to one F. L. Allen. Allen furnished the building for hotel purposes, and thereafter assigned his lease to a firm known as McNair & McCallum. The towel hangers, window shades, and medicine cabinets here involved were installed either by Allen or by McNair & McCallum. After receiving the assignment of the lease from Allen, McNair & McCallum executed and delivered to the appellant a chattel mortgage on the furniture and equipment in the hotel as security for the payment of the rent specified in the lease. Some time later,

McNair & McCallum sold their interest in the hotel to one F. M. Lucas, who operated it until he became delinquent in his rent to the extent of about $5,800, when he surrendered the possession of the premises and the contents to the appellant.

After the appellant took possession of the hotel, it operated it for a period of eight or ten months. During the time the appellant was operating the building, it purchased certain articles for the purpose of further equipping the hotel. When Lucas purchased from McNair & McCallum, he gave them a mortgage of $10,000 on the furniture for the purpose of securing the balance of the purchase price which was not then paid. On November 15, 1913, the appellant leased the premises to one B. H. Silver. On June 5, 1914, Silver mortgaged the property, including that installed therein by the appellant during the time it was operating the hotel, to the plaintiff to secure the payment of the sum of $1,600. Soon after this mortgage was given to the respondent Donahue, the appellant began the foreclosure of its prior mortgage which had been received from McNair & McCallum. On June 10, 1914, the respondent purchased from the appellant its rights under the McNair & McCallum mortgage, and the additional property which had been installed in the building while being operated by the appellant, for the sum of $3,300. On the date mentioned, a receipt was given by the appellant to the respondent for this sum. A few days thereafter, a bill of sale was executed by the appellant and delivered to the respondent, transferring to the latter the property which had been purchased by him. The receipt mentioned and this bill of sale will be referred to in the course of this opinion in greater detail. Silver continued to operate the hotel until about August 24, 1914, when possession was surrendered to the appellant, who thereafter operated it until some time in the month of December following, when the appellant notified the respondent to remove his furniture from the building. And here is where the controversy arose, both parties claimed title

to the property described in the complaint. The question, therefore, is, Which one was the owner of the property?

Before discussing the merits of the question, it will be necessary to consider the respondent's motion to dismiss the appeal. This motion is predicated upon the contention that the amount in controversy is less than $200, and that, therefore, this court is without jurisdiction. The value of the property which the plaintiff in his complaint sought to recover was alleged to be $540.10. It is true he only obtained a judgment for $95.60. The amount in controversy as limiting the right to appeal is determined by the averments of the pleadings. *Ingham v. Harper & Son*, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914 C. 528.

In addition to this, the respondent, in making the motion to dismiss, apparently overlooked the fact that the question in controversy here is whether the articles for which he obtained judgment are personal or real property. The motion to dismiss the appeal will be denied.

Upon the merits, the briefs devote some space and cite authorities touching the rule regarding what is known as trade fixtures, when the question arises between landlord and tenant. But whatever the correct statement of the rule may be and its application in a proper case, it here has no bearing. After the articles here in question had been installed by either Allen or McNair & McCallum, the possession of the premises was transferred to Lucas, and Lucas surrendered possession to the appellant, the owner of the property. If a tenant desires to exercise his right to remove trade fixtures, he must do so prior to surrendering possession. A mortgagee from a tenant has no greater right to remove trade fixtures from the premises after the tenant has surrendered possession to the landlord than the tenant himself would have. Whatever right or title the mortgagee from the tenant may have cannot rise higher than its source, and is measured by what the rights of the tenant would be at the time the mortgagee asserts his claim. *Bush v. Havird*, 12 Idaho 352, 86 Pac. 529;

Jones, Chattel Mortgages, § 123; Jones, Landlord & Tenant, 723.

If the respondent owns, and therefore has a right to the possession of the medicine cabinets, towel hangers, and window shades, it is because he acquired them by reason of the language in the bill of sale from the appellant. The bill of sale recites:

"It being understood that the party of the first part (The Hardman Estate, a corporation) does not in anywise warrant the sale hereby made, and it being further understood that this bill of sale shall not affect the title to the cafe and kitchen equipment contained in the said hotel Wilhard building or any fixtures attached to said building, whether installed by the party of the first part or otherwise, which said cafe and kitchen equipment and fixtures attached to said building shall remain the property of said party of the first part."

The receipt for the money paid, which was given a few days before the bill of sale, recited:

"It is understood that The Hardman Estate shall retain the title to all of the cafe and kitchen furniture and equipment, as well as to the electric signs and any other fixtures attached to the building."

The evidence shows that the window shades were attached to the building in the ordinary manner; that all towel hangers were actually attached to the building by screws; and that the medicine cabinets were not on hangers or hanging by ropes, but were attached by boring a hole in the wall and putting in a block to which the cabinet was fastened by means of screws, or else by fastening the cabinet to the studding by screws. All these articles were fixtures attached to the building. Under the reservation contained in the bill of sale, title thereto remained in the appellant. If the language of the bill of sale, "fixtures attached to said building," may be said to be of doubtful meaning, then the evidence of the conversation taking place at the time the receipt was given in which the same language appears, shows plainly that it was the

understanding of the parties that the fixtures attached to the building included the articles here in controversy.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment dismissing the action.

MORRIS, C. J., PARKER, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 13089. Department Two. May 9, 1916.]

CHARLES W. CLARK, *Respondent*, v. PACIFIC POWER & LIGHT COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—OBSTRUCTIONS—ORDINANCES—CONSTRUCTION—VIOLATION—NEGLIGENCE PER SE. A city ordinance prohibiting the maintenance of guy wires at less than a certain height above the "authorized grade of any street," under penalty of a fine, being penal and subject to strict construction, can have no application to streets for which no grade had been authorized by ordinance or some equally formal act evidenced by writing or actual improvement; hence the maintenance of such a wire in a street the grade of which was established only by user, is not a violation of the ordinance, and would not be negligence *per se*.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered December 8, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

John A. Laing, for appellant.

Reynolds & Bond, for respondent.

PARKER, J.—The plaintiff, Clark, commenced this action in the superior court for Walla Walla county, seeking recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant, Pacific Power & Light Company, in that it negligently maintained in a public street of the city of Walla Walla a guy wire run-

[1]Reported in 157 Pac. 462.

ning from one of its poles into the ground, upon which he tripped, receiving the injuries for which he claims damages. The trial resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed to this court. The contentions of counsel for appellant are against the rulings of the trial court as to the application of an ordinance of the city, prescribing the manner of maintaining guy wires in streets, to the facts of this case, which rulings were, in substance, that appellant was guilty of negligence *per se* in maintaining the guy wire in the street, because such maintenance was in violation of the ordinance.

At the time respondent was injured, appellant owned and operated a light and power system in the city of Walla Walla, its lines and poles occupying the streets and alleys of the city under a franchise granted for that purpose. Maple street, running east and west, is intersected by First street, running north and south. In this intersection, near the northeast corner thereof, there was one of appellant's poles on which was one of its street lights. In order to maintain this pole in an upright position, there was a guy wire attached to it at a point about thirty-seven feet above the surface of the street, from which it ran south across Maple street to the top of a pole about twelve feet high set in the ground on the south line of Maple street about nine feet west of the east line of First street. Another guy wire ran from the top of this pole south, descending at an angle of about forty-five degrees, and entered the ground in First street. This guy wire was about three-eighths of an inch in diameter, evidently consisting of several wires twisted together. At night it was directly in the shadow of the pole to which it was attached, the shadow being from the electric light on the pole first above mentioned. It was over this guy wire, near where it entered the ground, that respondent tripped, in the nighttime, not seeing the wire because of its being in the shadow.

This portion of First street south of Maple street comes to an end some two hundred feet to the south without con-

nection with any other street. It has been dedicated as a street for more than twenty years. It lies comparatively level, so that all parts of it can be used for ordinary travel without improvement, and has been so used to a considerable extent, at least for many years past. There are no buildings fronting thereon. At its south end, there is a gate leading to a dancing platform used in the summer seasons, and also a gate leading to the gardens of some Chinamen. These things seem to have furnished the reason for what travel passed over this portion of the street. There is no evidence in the record of this case tending to show that the city has ever improved any portion of First street south of Maple street in any manner whatever, nor that the city has ever established any grade therefor by ordinance or other formal action evidenced in writing. Indeed, the arguments of counsel upon both sides proceed upon the theory that no grade of this portion of First street was ever so established.

Ordinance No. 901 of the city, which the trial court permitted counsel for respondent to introduce in evidence over the objection of counsel for appellant, so far as we need here notice its provisions, reads:

"Sec. 1. Hereafter it shall be unlawful for any person, firm, or corporation to construct, erect, build, run or maintain any wire or wires, whether for telephone, telegraph, electric light or power, or any other purpose whatever, at a less height than thirty-five feet in the clear above any part of the authorized grade of any street, sidewalk, or alley, or public place within the limits of the city of Walla Walla. Any wires carried from poles to buildings, thirty-five feet high or higher, shall be carried to the tops of such buildings. Anyone violating the terms of this section shall, upon conviction thereof, be fined in any sum not less than $5 or more than $100.

"Sec. 2. The council may, upon application, for good cause shown, permit by order, wires for guys or stays running with the line of the street, or curb, but not crossing street or alley intersections, at a less height than 35 feet, but not less than 15 feet above the authorized grade."

At the conclusion of the trial, the court gave to the jury, among other instructions, the following:

"I instruct you that it was, on January 8, 1914, unlawful for any person, firm or corporation to build, erect or maintain any wire or wires for guys or stays or for any purpose whatever, at a less height than fifteen feet above the authorized grade of any street within the city of Walla Walla.

"Where no other grade has been adopted or established by the municipality, the words: 'Authorized grade,' as used in Ordinance No. 901 of the city of Walla Walla, mean the surface grade of any street, sidewalk, alley or public place, natural or improved, which the municipality holds open to the public for the purpose of travel and which it permits the public to use for such purpose.

"I further instruct you that a thing which is done or maintained in violation of positive law is in itself negligence; and, if you find from the evidence in this case, that at the time of the alleged injury to plaintiff, the defendant had erected and was then maintaining a guy wire running from a pole and entering the ground within First street of said city, at or near its intersection with East Maple street, at a less height than fifteen feet above the authorized grade of said street, and if you further find that plaintiff ran into and tripped over said wire and was injured thereby as alleged, if you find he was so injured, then that would constitute negligence on the part of the defendant for which it would be liable to plaintiff on account of any injuries which he may have sustained, as hereinafter instructed, unless you further find that plaintiff, under all the circumstances of this case, was himself guilty of such contributory negligence as would preclude him from recovery."

These rulings of the court in admitting in evidence this ordinance and in giving these instructions amount in effect to deciding and telling the jury that the maintenance of the guy wire in First street by appellant was negligence *per se*, because it was in violation of the provisions of ordinance No. 901, above quoted. We feel constrained to hold that this was error, being of the opinion that the words "Authorized grade of any street," as used in the ordinance, have no reference to any street other than such streets as the city may have

established, or "authorized" the grade of by some affirmative act, that is, by ordinance or some other equally formal act evidenced in writing, or by actual improvement. This ordinance is plainly penal in its nature, and is therefore to be strictly construed. 28 Cyc. 389; 36 Cyc. 1183.

An act that is not clearly within the prohibitive terms of the ordinance should not be held to subject the doer of such act to the prescribed penalty. We are thus led to the conclusion that, since the city never "authorized" any grade for this portion of First street by any affirmative act upon its part, appellant did not violate the terms of the ordinance and hence was not guilty of negligence *per se*, as the court in effect instructed the jury it was because of the violation of ordinance No. 901.

It may be that the jury would have found appellant guilty of such negligence as became the proximate cause of respondent's injury under all the facts and circumstances disclosed by the evidence, aside from the alleged violation by appellant of this ordinance by the maintenance of the guy wire in First street. It may also be that the jury would not have so found in the absence of these rulings of the trial court, which in effect required the jury to find that appellant was guilty of negligence, since the maintenance of the guy wire in First street was conceded, leaving the jury nothing of any consequence to consider other than whether or not such negligence was the proximate cause of respondent's injury, whether or not he was guilty of contributory negligence, and the amount of damages he was entitled to, if any.

The argument of counsel for respondent seems to proceed upon the theory that the question of this portion of First street having an "authorized grade" should be determined as where the question of change of grade arises between the city and owners of abutting property who have improved their property with reference to a grade long acquiesced in by the public though not formally established. Their cited authorities relied upon have to do with controversies of that nature.

Whatever rights property owners might have under such circumstances to have such a grade remain unchanged, as against an effort on the part of the city to change it, we think the well established rules of construction applicable to penal statutes and ordinances require us to hold that the words "authorized grade of any street," as used in this ordinance, excludes all streets the grades of which have not been established or "authorized" by some affirmative act of the city. Plainly this portion of First street has never had its grade so established or "authorized."

It may be suggested that appellant was guilty of violating ordinance No. 901 in maintaining the guy wire across Maple street at a less height than thirty-five feet, because of the established grade of Maple street, assuming that there was an established grade of that street. If so, such violation of the ordinance was plainly not the cause of respondent's injury, and hence is foreign to the question of appellant's negligence, if any, which caused respondent's injuries.

We are of the opinion that the admission of ordinance No. 901 in evidence, and the instructions of the court touching its applicability to this portion of First street, was error prejudicial to appellant's rights, entitling it to a new trial. This conclusion renders it unnecessary for us to notice other claims of error. The judgment is reversed, and the cause remanded to the superior court for further proceedings not inconsistent with the views herein expressed.

MORRIS, C. J., MAIN, and BAUSMAN, JJ., concur.

[No. 13170. Department One. May 9, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. E. C. WILSON, *Appellant*.[1]

CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES—PARTICULAR DESCRIPTION. The dismissal of an information for stealing thirty sacks of "Hybrid" wheat, after jury sworn, does not bar the filing of a new information for stealing thirty sacks of "Jones Fife" wheat; since, while a particular description is unnecessary, if given, a variance is fatal, and a conviction of the one does not amount to conviction of the other.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered July 9, 1915, upon a trial and conviction of grand larceny. Affirmed.

W. E. Southard, for appellant.

C. G. Jeffers, for respondent.

MOUNT, J.—The appellant was convicted upon a charge of grand larceny. This appeal is from a sentence pronounced thereon. The sole question in the case arises upon the plea of former jeopardy.

The facts are not in dispute, and are as follows: The prosecuting attorney for Grant county filed an information charging the appellant with the crime of grand larceny by stealing and carrying away thirty sacks of Hybrid wheat, of the value of $55, the property of Redpath & Maynard. The information alleged that the crime was committed on the 27th day of September, 1914. Thereafter, in January, 1915, a jury was impaneled and sworn to try the case. The prosecuting attorney made his opening statement to the jury, and stated that he expected to prove the larceny by the appellant of thirty sacks of Hybrid wheat. The prosecuting attorney was then informed that the wheat taken was not Hybrid wheat, but was Jones Fife wheat. Thereupon he dismissed the

[1]Reported in 157 Pac. 474.

information already filed, and filed a new information charging that the appellant stole and carried away thirty sacks of Jones Fife wheat, of the value of $55, and the property of the same owner, committed on the 27th day of September, 1914. In June, 1915, the case came on for trial upon the new information. In answer to this information, the appellant entered a plea of former jeopardy, and the case was tried upon that issue. So that the question in the case is whether or not, under these facts, there was former jeopardy.

The rule is that, when the accused is placed upon trial in a court of competent jurisdiction upon a sufficient indictment or information, before a jury legally impaneled and sworn, the discharge of the jury without the consent of the accused is equivalent to an acquittal of that charge. *State v. Kinghorn*, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136; *State v. Dye*, 81 Wash. 388, 142 Pac. 873. So that the question in this case is narrowed to whether the charge of stealing "Hybrid" wheat is the same as the charge of stealing "Jones Fife" wheat. Is the particular description material?

We think there can be no doubt that an information charging the defendant with stealing and carrying away thirty sacks of wheat, without describing the character of the wheat, would be a sufficient allegation. But the rule is that, where an information gives a particular description of the article stolen, it is necessary to prove that description; otherwise, there is a fatal variance in the proof.

In the case of *Morgan v. State*, 61 Ind. 447, where an indictment for larceny described a pistol stolen as a "Smith & Wesson" revolver, the court held that proof of the larceny of a "Smith & Weston" revolver was a fatal variance. It was there said:

"It is a well established rule in criminal proceedings, that where, in an indictment, a particular description is given by way of identifying an article of property alleged to have been stolen, the state is bound by the description thus given, and that, to justify a conviction, the evidence must sustain the

description contained in the indictment. Starkie Ev., 8th Am. Ed., 628; 1 Bishop Crim. Proced., sec. 579; 1 Wharton Crim. Law, sections 592, 610. . . . Where an indictment for larceny contains particulars descriptive of the property stolen, though unnecessarily inserted, such particulars must be proved on the trial. *The State v. Jackson*, 30 Me. 29."

In *Hardy v. State*, 112 Ga. 18, 37 S. E. 95, it was said:

"Where the indictment charged the accused with the larceny of a 'fawn-colored Jersey heifer about eighteen months old', and the proof showed the larceny of a fawn-colored heifer, this was a fatal variance."

In *Hill v. State*, 41 Tex. 253, where certain hides were stolen which were described in the indictment as "red and white spotted," and the evidence showed that the hides were "white and spotted," and "white and black spotted," it was held that this was a material variance. The court there said:

"It was unnecessary to use such minuteness of description in the indictment; but it is said 'that no objection, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage.' (1 Wheat. Cr. Law, sec. 630; *United States v. Howard*, 3 Sumn., 12; *State v. Noble*, 15 Me., 476). In a charge of theft of a 'black horse,' the objection of color is unnecessary, yet as it is descriptive of the subject-matter of the charge, it cannot be rejected and the man convicted of stealing a brown horse or a white horse. (15 Me., 476; 3 Starkie, 151; 30 Me., 29; 1 Greenl. Ev., § 65). Greenleaf lays down the rule thus: 'Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved, for they are all made essential to the identity.' "

In *Priesmuth v. State*, 1 Tex. App. 480, where the information alleged that the brand was upon the hip of a cow, and the evidence showed that the brand was on the ribs, it was held that such a discrepancy was material, and that a conviction must be set aside.

In *Ranjel v. State*, 1 Tex. App. 461, where the indictment

charged theft of a bay gelding branded P. A. R., and the proof showed that the animal lost was branded P. R. A., this was held a fatal variance between the allegations and the proof.

In *McGee v. State*, 4 Tex. App. 625, an information charging the theft of a pair of "buckskin gloves," when the evidence showed that the gloves were "sheepskin gloves," was held to be a fatal variance.

In *Cameron v. State*, 9 Tex. App. 332, where the indictment charged the theft of a beef steer, and the proof showed that the animal was a steer, but not a beef steer, it was held that the indictment need not have described the steer as a beef steer, but having done so, the proof must correspond.

This rule is based upon the idea that the particular description is essential to the identity of the thing taken. Under this rule, evidence to the effect that the wheat taken was "Jones Fife" wheat would not have sustained a conviction for the stealing of "Hybrid" wheat. It seems plain that a charge of larceny of a Jersey cow would not support proof that the larceny was of a Holstein, or some other well known breed of cattle. We think the same must be true in this case, that a charge of stealing Hybrid wheat would not sustain a charge of stealing Jones Fife wheat. These two kinds of wheat are well known classifications, and when an information charges a theft of one, proof is not admissible of another. Conviction for the theft of one does not amount to a conviction for the theft of another. In short, we are convinced that the description of the wheat in these informations was a material part of the description in order to identify the wheat which was alleged to have been stolen. We are satisfied, therefore, that an acquittal upon a charge of stealing Hybrid wheat was not an acquittal for the stealing of Jones Fife wheat.

The appellant in his brief insists that the charge upon which the defendant was acquitted by the discharge of the jury upon the first information was the "*same offense*" upon

which he was convicted under the second information. But we have seen above that the particular description of the wheat was a material description. The offense, therefore, was not the same, even though the wheat in both cases may have belonged to the same man, and the same wheat which the prosecuting attorney intended to describe, but failed in the first information.

We find no error, and the judgment is therefore affirmed.

ELLIS and BAUSMAN, JJ., concur.

MORRIS, C. J., and CHADWICK, J., concur in the result.

[No. 13201. Department Two. May 9, 1916.]

D. A. DUFFY, *Respondent*, v. J. FRED BLAKE, *Appellant*.[1]

EVIDENCE—FORMER TRIAL—IDENTITY OF PARTIES AND ISSUES—STATUTES. Evidence given at a former trial in an action upon a note by a holder in due course is not admissible in a subsequent action by the maker against the payee for fraud in its procurement, under Rem. & Bal. Code, § 1247, authorizing the use of a certified copy of the testimony of an absent witness given at a former trial of the same cause, in any civil action between the same parties relating to the same matter.

SAME — FORMER TRIAL — PARTIES — PRIVITY. The fact that two parties in two different suits were interested in proving or disproving the same facts creates no privity between them; as the ground of privity is property and not personal relation.

SAME—FORMER TRIAL—IDENTITY OF ISSUES. There is no identity of issues in two actions, so as to make testimony at the former trial admissible in the other, where in the first action, upon a promissory note, the only issue was whether plaintiff was a holder in due course, making the question of fraud in its procurement immaterial, and the second action was by defendant in the former, for damages for the fraud of the payee.

SAME—FORMER TRIAL—NOTES OF TESTIMONY. The stenographer's evidence as to the testimony of an absent witness, given at a former trial, is inadmissible where the witness did not refresh her memory

[1]Reported in 157 Pac. 480.

from her shorthand notes, but read directly from a transcript of the notes made by herself or dictated to a phonograph.

Appeal—Review—Error Assigned by Respondent. Error cannot be urged by respondent, in the absence of any cross-appeal.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for fraud. Reversed.

Eugene A. Childe and *Kerr & McCord*, for appellant.

Carkeek & McDonald and *Geo. Coryell*, for respondent.

Morris, C. J.—Action to recover damages on account of false representations inducing the purchase by respondent of 498 shares of the capital stock of the Valdez Furniture Company. The case is here for the second time. The first trial resulted in a nonsuit, which on appeal was reversed. *Duffy v. Blake*, 80 Wash. 648, 141 Pac. 1149. The second trial resulted in judgment against appellant, from which this appeal is taken.

Nothing need be added to the statement of facts that appears in the first opinion, since the only question involved in this appeal is one of law. At the trial, respondent, after introducing testimony to the effect that one Carlin, after diligent search, could not be found, called a Miss Campbell, who testified she was the stenographic reporter who took the testimony in the case of *Wells v. Duffy;* that her original notes of such testimony were lost, but that she had either transscribed the testimony herself or dictated it into a phonograph, and that the transcript she then produced was a correct transcript of her original notes. She was then asked if the transcript contained the testimony given by Carlin, which question being answered in the affirmative, she was then asked to read such testimony from the transcript. Appellant objected to this procedure, which objection was overruled. This is now assigned as error.

Previous to the trial, respondent, seeking to avail himself of this testimony, served notice of his intention so to do, seeking to adopt the provisions of Rem. & Bal. Code, § 1247 (P. C. 81 § 1127), which are as follows:

"The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer, or reduced to writing, and certified by the trial judge, upon three days' notice to the opposite party or parties, together with service of a copy of the testimony proposed to be used may be given in evidence in the trial of any civil action or proceeding, where it is between the same parties and relates to the same matter."

Under this statute the testimony to be available must be given in a former trial of the same cause. This testimony was not so given. The case of *Wells v. Duffy* was not a former trial of this same case. Neither was it between the same parties, nor upon the same subject-matter. Statutory rights of this character cannot be extended beyond the language of the privilege, and if the statute is relied upon it must be plain that it covers the offer. We are, therefore, of the opinion that the testimony was not admissible under the statute.

Respondent argues that if it should be so held, then the testimony was admissible under the common law rule stated in 16 Cyc. 1088, as follows:

"Facts may be established by evidence thereof given on a former trial, provided the court is satisfied, (1) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (2) that the issue is substantially the same in the two cases; (3) that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; and (4) that a sufficient reason is shown why the original witness is not produced."

This contention necessitates some reference to the case of *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907, to determine

the parties and issues there involved. As part payment of the purchase of the stock herein referred to, Duffy gave Blake a note for $2,000. This note was sold by Blake to the American Mortgage & Guaranty Company, and subsequently passed to Wells by indorsement. Both of these indorsements were before maturity and without notice of any defect in the note. Subsequently Wells sued Duffy upon the note, Duffy defending upon the plea of fraudulent representations made by Blake, setting up the same fraudulent representations relied upon in this action. The lower court made no finding upon the issue of fraud, but held that Wells was a holder in due course and entitled to recover. This finding was sustained on appeal to this court. In so holding, we said:

"Assuming however, without deciding the question, that the note was obtained by means of fraudulent representations made by the payee, the respondent is entitled to recover on either of two grounds, (1) he purchased from a holder in due course, and (2) he is a holder in due course."

The question now raised is, Is there privity between Wells in that action and Blake in this action? "Privity" is variously defined. In general, it denotes a mutual or successive relationship to the same right of property or subject-matter, or partakes in an interest in any action or thing. *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186. Where, as here, it is sought to establish the relation because of what has transpired in a former action, it is essential that there be an identity of issue. The two actions must concern the same subject-matter, and the proof must be directed to a fact material in both cases. 2 Chamberlyne, Modern Law of Evidence, § 1664. The above general rule is to be read with this distinction: that the ground of privity is property, not personal relation; and where, as here, the relation is sought to be predicated upon what has transpired in a former action, it is essential that there be an absolute identity of interest. Based upon this essential, the rule has become established

that the fact that two parties litigant in two different suits happened to be interested in proving or disproving the same facts creates no privity between them. *Logan v. Atlantic & C. Air Line R. Co.*, 82 S. C. 518, 64 S. E. 515; *Burlen v. Shannon*, 3 Gray 387; *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669; *Tourtelotte v. Brown*, 4 Colo. App. 377, 36 Pac. 73; *Spencer v. Williams*, 2 Probate & Divorce (Eng.), 230.

Respondent cites *Lyon v. Rhode Island Co.* (R. I.), 94 Atl. 893, L. R. A. 1916 A. 983, as supporting the admission of this testimony. It was there held that the testimony of a motorman, in an action by a father as next of kin for a minor child to recover for injuries caused by a collision with a street car, was admissible in a subsequent action by the father to recover for injuries to himself growing out of the same accident. The same counsel represented the father in both actions, with full opportunity for cross-examination. This case, and others cited in the annotations, based the admissibility of the testimony upon the rule that the law does not look to an exact and technical identity of parties and causes of action, but rather to the identity of the question under investigation and to the opportunity of the party against whom it was offered to cross-examine. Whether or not this is the true rule, it is not necessary for us now to determine, since the case to be decided does not present the facts upon which such rule is based. In the *Wells* case, the issue was whether or not the party was a holder in due course of the note upon which the action was brought. Being such a holder, it was immaterial whether or not the note was obtained by fraud, so that while the fraud of Blake in obtaining the note was urged as a defense, Wells was only interested in proving he was a holder in due course, and was not interested in disproving the fraud of Blake. In the present case, the only question to be determined is the fraud as between Duffy and Blake. There is no identity between these two issues. The most that can be said is that Duffy in this

suit is interested in proving one of the issues he sought to establish in the former suit, which was there material only upon the showing that Wells took the note with knowledge of its fraudulent character, and which became immaterial upon his failure to show that Wells was not a holder in due course. It must also be apparent that the judgment in the *Wells* suit determined there was no privity between Wells and Blake, since if there had been, and Blake had been guilty of fraud in obtaining the note, Wells could not have recovered. Not being in privity with Blake then, it cannot be said that Wells is in privity with Blake now.

There is another vice in the admission of this testimony. The witness did not refresh her memory from her shorthand notes, but read directly to the jury from a transcript of those notes made either by herself or dictated to a phonograph. This was improper. *Kellogg v. Scheuerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

Respondent urges that the admissibility of this evidence was determined by this court in his favor when the case was here before. That was an appeal by Duffy from a nonsuit. Blake, in seeking to sustain the ruling, contended against the admission of this same testimony, but inasmuch as he had taken no cross-appeal, we disregarded his claim of error in this respect.

The judgment is reversed, and the cause remanded for a new trial.

Bausman, Main, Parker, and Holcomb, JJ., concur.

[No. 13233. Department Two. May 9, 1916.]

HANDLEY INVESTMENT COMPANY, *Appellant*, v. J. D. TRENHOLME, *Respondent*.[1]

LIMITATION OF ACTIONS—STOCK—UNPAID SUBSCRIPTIONS — CALL — DUE DATE. A cause of action upon an unpaid stock subscription of a solvent corporation, call for which was made payable at a future date, accrues and the statute of limitations commences to run from the date the call was due and payable, and not from the date of the call.

CORPORATIONS—STOCK SUBSCRIPTION—FRAUD — PURCHASE OF PROPERTY. An allegation of fraud, inducing a subscription to the capital stock of a corporation organized for the purpose of purchasing certain real estate, is not sustained where the preponderance of the evidence was to the effect that the property was acquired at its then market value.

Appeal from a judgment of the superior court for King county, Ralston, J., entered June 30, 1915, dismissing an action to recover upon an unpaid stock subscription, tried to the court. Reversed.

Byers & Byers, for appellant.

Kerr & McCord, for respondent.

MAIN, J.—This action was brought by a corporation against the defendant, one of its stockholders, for the purpose of recovering the balance due upon a stock subscription contract. The defendant admitted the subscription, and that only the sum stated in the complaint had been paid thereon, and affirmatively pleaded that the contract was induced by fraud. The cause was tried to the court without a jury, and resulted in a judgment of dismissal. From this judgment, the plaintiff appeals.

The facts are these: The Handley Investment Company, a corporation, was organized on or about December 6, 1906,

[1]Reported in 157 Pac. 472.

with a capital stock of $100,000, divided into 1,000 shares of the par value of $100 per share. Soon after the organization of the company, its entire capital stock was subscribed for by some twenty-five or thirty persons. The respondent's subscription was for fifty shares, or $5,000 worth of the stock. The subscription contract provided for payment "subject to the call of the trustees."

The corporation was organized for the purpose of acquiring a certain tract of land in the city of Seattle, located on Hubbell Way, Union street, and Terry avenue. The corporation acquired this land for the price of $90,000, paying thereon $55,000 in cash, and the balance to be due in two equal payments, due, respectively, in one and two years. During the month of November, 1907, the board of trustees made a call for 22½ per cent of the amount of the subscription. This was for the purpose of meeting the payment due that year. In response to this call, the respondent paid only 2½ per cent. On November 8 or 9, 1908, the board of trustees made a call of 22½ per cent of the subscription, this being the balance due thereon, for the purpose of meeting the payments due upon the property for that year. The respondent refused to make any payment in response to this call. This action was brought for the purpose of recovering the balance due upon the contract. This would include all of the call for the year 1907, except the 2½ per cent paid, and the balance due under the call for 1908, and interest thereon, the former amount being for $1,000, and the latter for $1,125. The call made on the 8th or 9th of November, 1908, required that the payments due thereon be made December 12, 1908. The complaint in the action was filed in the office of the clerk of the superior court on November 11, 1914.

The first question is whether the statute of limitations had run against the right to maintain the action. From the facts stated, it will be observed that the last call was made on the 8th or 9th day of November, 1908; but the payments required under that call were not due until December 12, 1908.

If the date for the starting of the statute of limitations is the date of the call, then a few days more than six years had elapsed prior to the filing of the complaint, and the action would be barred. If the statute was not set in motion until December 12, 1908, or the time when the payments were to be made, then the complaint was filed approximately one month before the six years' limitation had expired. This refers, of course, only to the call made during the year 1908. As to the call made during the year 1907, no further mention need be made, for as to the amount due upon that call, the action was about one year tardy.

It is a general, if not a universal, rule that the statute of limitations does not begin to run prior to the time when an action can be maintained. In this respect there can be no difference in principle when the limitation statute is invoked against an action brought upon a contract of subscription for the capital stock of a corporation from that of any other character of action. In 2 Clark & Marshall, Private Corporations, § 490, it is said:

"The statute necessarily commences to run, in the absence of special circumstances, as soon as the right to maintain an action accrues, and not before. If a subscription is payable immediately, without any necessity for a call, or if it is payable on a day certain, the statute begins to run at once, or from the day when it became payable, as the case may be."

The generally accepted doctrine seems to be that the statute of limitations begins to run upon a subscription for stock only after a call has been made and is due. 4 Thompson, Corporations (2d ed.), § 3881; 1 Cook, Corporations (7th ed.), § 195. In the authority last cited, after referring to certain decisions which held that the statute of limitations would run after the time when a call became possible, even though it was not made, the author observes:

"But the better rule, and the one supported by the weight of authority, is that the statute of limitations begins to run on a subscription for stock only after a call has been made and is due."

It is held in Iowa, in *Great Western Tel. Co. v. Purdy*, 83 Iowa 430, 50 N. W. 45, that the statute runs from the time when the call became possible, and not from the date when the amounts demanded by the call became due. So far as we are informed, that is now the only state supporting that doctrine. A like view was entertained, however, in some of the earlier decisions in Pennsylvania; but in *Cook v. Carpenter*, 212 Pa. St. 165, 61 Atl. 799, 108 Am. St. 854, 1 L. R. A. (N. S.) 900, the court of last resort in that state, after reviewing its previous holdings, adopted the view that the statute of limitations does not begin to run until after a call has been made. A like view is entertained by the supreme court of the United States (*Great Western Tel. Co. v. Purdy*, 162 U. S. 329), except when it is reviewing the statute of limitations of a state in which the action is brought, and which has been construed by the highest court of that particular state differently. In such a case, the supreme court of the United States follows the construction given by the state court. The decision of the United States supreme court, therefore, in affirming the Iowa supreme court (*Great Western Tel. Co. v. Purdy, supra*) is not an authority for the general proposition that the statute begins to run from the time when the call became possible. When the United States supreme court is reviewing the judgments of subordinate Federal courts, and is unaffected by the decisions of the highest court of the state construing the statute in which the action arose, that court adopts a view similar to that contained in the excerpt quoted from 1 Cook, Corporations, *supra*.

The rule that the statute does not begin to run until the call has been made and is due seems reasonable. Prior to the making of the call, the contract is contingent. The balance due upon the subscription contract may or may not be called for, depending upon the necessities of the company. If the business prospers, no further payments might be needed. If further payments are required, they are subject

to the call of the trustees. Until a call has been made and is due, it is reasonably plain that the corporation cannot maintain an action upon the contract. If an action cannot be maintained upon a contract until after a call has been made and is due, then the statute of limitations would not be set in motion until that time.

It should be remembered that the Handley Investment Company in bringing this suit is a solvent corporation acting through its board of trustees. The rule as to when an unpaid stock subscription is due and payable when the corporation is insolvent and in the hands of a receiver or trustee will be found in other decisions of this court not necessary here to review.

The next question is whether the contract of subscription was induced by fraud. The trial court made no finding upon this subject. While it does not appear very clearly from the record, it yet seems apparent that the trial court was of the opinion that the statute of limitations barred the action in its entirety, and, for that reason, entered a judgment of dismissal. Assuming, but not deciding, that if the property taken over by the corporation at $90,000 was acquired at a price materially above its market value, that this fact, taken in connection with the other circumstances, constituted a fraud inhering in the respondent's contract of subscription, inquiry will be directed to whether the property, at the time of the transfer to the corporation, was worth substantially $90,000. Upon this question the evidence is conflicting. The burden was upon the respondent to establish fraud, if it existed. After giving careful consideration to all the evidence upon this question, we are of the opinion that the evidence not only fails to preponderate in favor of the contention that the value of the property was materially less than $90,000 at the time it was acquired by the corporation, but that it preponderates in supporting the position that, at the time the property was acquired by the corporation, it was worth upon the market, under the then market conditions, $90,000.

It is not necessary to review the circumstances which the respondent contends constituted fraud, since if the property was acquired by the corporation at a value not then excessive, the respondent could not well be defrauded. The trial court was in error in holding that the action could not be maintained for the $1,125 and interest thereon, due under the call made during the year 1908.

The judgment will be reversed, and the cause remanded with direction to enter a judgment in accordance with this opinion.

MORRIS, C. J., PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13206. Department Two. May 10, 1916.]

JAMES R. GATES, *Appellant*, v. L. I. GREGORY, *Respondent*.[1]

CORPORATIONS—SALE OF STOCK—ACTION FOR PRICE—FRAUD—EVIDENCE. In an action for the price of stock, it is a good defense that it was induced by the fraud of the president and principal stockholder, who represented that the corporation was in a prosperous condition and the book value of the stock was a certain amount when in fact it was not, and that a certain man of prominence was a member of the board of directors when in fact he was not.

SAME—SALE OF STOCK—FRAUD OF OFFICER—NOTICE TO CORPORATION. A corporation is constructively charged with notice of fraud in the sale of stock, by its president and principal stockholder, who was in exclusive charge of its affairs, and acted alone, both for himself and the company, in making the sale of his stock, taking a note therefor secured by the stock as collateral, and transferring the note to the corporation before maturity, giving himself credit upon the books of the company.

ESTOPPEL—ELEMENTS—KNOWLEDGE—ACQUIESCENCE. A director induced to purchase stock in a corporation through fraud is not charged with knowledge of the fraud or estopped to defend an action upon a note for the purchase price, from the fact that he was present at a board meeting at which a resolution was adopted authorizing the transfer of assets of the company as might seem consistent with the best interests of the company, under which resolution the note

[1]Reported in 157 Pac. 470.

passed with other assets, he having no knowledge that his note had passed to the company and no specific assets being considered.

BAUSMAN, J., dissents.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 26, 1915, upon findings in favor of the defendant, in an action on a promissory note, tried to the court. Affirmed.

C. A. Riddle and *James Kiefer*, for appellant.

H. D. Folsom and *Carkeek & McDonald*, for respondent.

MAIN, J.—In this case the plaintiff sought to recover upon a promissory note which had been transferred to him by the Guardian Life Insurance Company, a corporation, for the purpose of suit. The complaint contains the usual allegations in such an action. The allegations of the complaint are denied in the answer, except the execution of the note is admitted, as well as the fact of nonpayment. The answer affirmatively pleads that the giving of the note was induced by fraud. In the reply, the charge of fraud is denied, and it is pleaded that the defendant, while he was a trustee of the Guardian Life Insurance Company, recognized the note as belonging to that company in such a way that he cannot now interpose the defense of fraud when that company is the party beneficially interested in the action. The cause was tried to the court without a jury and resulted in a judgment for the defendant. The plaintiff has appealed.

The facts necessary to an understanding of the questions here to be considered are these: On December 29, 1908, one J. T. Stimmel, being then the majority stockholder, president, and manager of the Guardian Life Insurance Company, transferred twenty-five shares of his stock in that company to the respondent and took from the latter a promissory note calling for the payment of $2,075, due December 1, 1909. The stock for which the note was given was returned to Stimmel as collateral security for the payment of the note.

On the day following, Stimmel transferred the note to the Guardian Life Insurance Company, and gave himself credit upon the books of the company for the amount thereof. In transferring the note to the insurance company, Stimmel acted both for himself and for that company. No one else participated in the transaction.

Before the day on which the note was given, Stimmel, as president of the Guardian Life Insurance Company, had called upon the respondent a number of times, who was then secretary of the Title Trust Company, of Seattle, and solicited him to become one of the stockholders and trustee of the Guardian Life Insurance Company. One of the reasons most strongly urged by Stimmel to the respondent in his endeavor to close the transaction which resulted in the giving of the note, was that Stimmel desired the respondent to act as a trustee of the insurance company in order that he might induce certain eastern people to become financially interested in the company, it being his thought that a local man experienced in trust company business would aid the standing of the insurance company in the estimation of possible investors. At this time the respondent was secretary of the Title Trust Company, doing a trust and banking business. Subsequent to the giving of the note, the respondent became a member of the board of trustees of the Guardian Life Insurance Company, and acted in that capacity until September 6, 1910.

On July 22, 1909, the Guardian Life Insurance Company, being in financial difficulties, the board of trustees held a meeting and passed a resolution authorizing the reinsurance of the business of the company in some reliable insurance company; and that the assets of the company be disposed of in a way most consistent with the best interests of the Guardian Life Insurance Company. In pursuance of this resolution, certain of the assets, including the respondent's note, were transferred to the American Savings Bank & Trust Company for collection. A few days prior to the due date of the note,

the respondent received notice from the last named company that it held the note for collection, and requested payment. This was the first knowledge that the respondent had that the note had passed out of the possession of Stimmel and had become part of the assets of the insurance company. The note not being paid, was returned by the American Savings Bank & Trust Company to the Guardian Life Insurance Company, and was subsequently transferred to the appellant for the purpose above stated. Further facts will be stated in connection with the consideration of the questions to which they may be particularly pertinent.

The principal question in the case arises as to the nature of the transaction between Gregory and Stimmel which culminated in the giving of the note sued upon. The respondent claims that the giving of this note was induced by fraud, in two particulars: First, that Stimmel misrepresented the financial condition of the insurance company, stating that it was in a prosperous condition, when its financial affairs were in a bad condition; and second, that Stimmel had falsely represented to the respondent that two prominent men were members of the board of directors, when in fact they were not.

The trial court found that the representations of Stimmel in the two particulars mentioned were false and fraudulent. In other words, that the company was represented to be in a prosperous condition and that the book value of its stock was a certain amount, when in fact the company was in failing circumstances and the book value of the stock was much less than that represented. And also that Stimmel had represented that one man in particular, in whom the respondent had great confidence, was a member of the board of directors, when in fact he was not.

Without detailing the evidence, it may be said that, after a careful consideration of all the evidence, we are of the opinion that the evidence supports the finding of the trial

court. In *Boehme v. Broadway Theater Co., ante* p. 104, 157 Pac. 218, it was said:

"The financial condition of the company, the volume of its business, the amount of its income and expenses, and what these had been in the past, were all matters peculiarly within the knowledge of the appellants and not easily ascertainable by respondent. We have frequently held that representations as to such matters are representations as to matters of fact, and if false and made with knowledge that they were being relied upon by the other party, constitute actionable fraud."

The giving of the note having been induced by fraud, the next question is whether the Guardian Life Insurance Company is chargeable with knowledge of this fraud. The trial court found, and this finding is sustained by the evidence, that Stimmel was the president of the company, in active, practical, and exclusive charge of its affairs, and of its books, papers, and documents; that, though the corporation had a board of trustees, Stimmel was permitted to exercise, and did exercise, practically complete dominion over the affairs of the corporation; and that he was, during his term as president, to all practical intents and purposes, the corporation itself. In addition to this, the evidence shows, as above stated, that, in the transfer of the note from Stimmel to the insurance company, he acted both for himself and the corporation. No one else took any part in the transaction.

In support of his position that the insurance company was not constructively charged with knowledge of the fraud which induced the giving of the note, the appellant invokes the rule that the principal is not chargeable with the fraud of its agent when the conduct of the latter is such that a presumption arises that the agent would not communicate the fact to the principal; as where the communication of such fact would disclose a fraudulent scheme or transaction. But that rule, we think, does not fit the facts in this case. The rule here applicable is that, where an agent or officer of a corporation in an individual transaction of his own with a third party

induces the giving of a note from such third party by fraud, and subsequently transfers the note to the corporation of which he is an agent or officer, acting in the transfer to the corporation both for himself and the corporation, then the corporation is charged constructively with knowledge of the fraud, and since it acts through that officer alone, his knowledge must be imputed to it. The principal is regarded as acting with knowledge of a fraudulent act when represented solely by an agent who possesses such knowledge. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. 698; *Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072; *First Nat. Bank of New Milford v. New Milford*, 36 Conn. 93; *Holden v. New York & Erie Bank*, 72 N. Y. 286; 3 Clark & Marshall, Private Corporations, p. 2214.

In this case, Stimmel, owner of the majority of the stock, president, and manager of the corporation, committed the fraud which induced the giving of the note. He transferred the note to the corporation, giving himself credit upon the books therefor. In this transfer no other person represented the corporation. Stimmel acted both for himself and the corporation. Had the corporation, at the time of the transfer of the note to it, been represented in the transaction by its board of trustees, or by some other officer of the corporation, a different question would be presented.

It is next claimed that the respondent is estopped from asserting that the Guardian Life Insurance Company took the note charged with knowledge of the fraud, since he was present at a meeting of the board of trustees on July 22, 1909, and acted as secretary *pro tem* of that meeting, at which a resolution was passed authorizing the transfer of the assets of the company in such a way as might seem consistent with the best interests of the company, and that the note in question passed to the American Savings Bank & Trust Company under this resolution, together with certain other assets. But this position is not tenable. The necessary elements to con-

stitute an estoppel are not here present. At the time the resolution was passed, the respondent had no knowledge that his note had been transferred to the company by Stimmel. When the resolution was passed, only a general plan of operation was adopted; no specific assets were considered.

There are certain assignments of error predicated upon rulings of the trial court in receiving and rejecting certain testimony. Without reviewing these in detail, it may be said that, after giving consideration to them, we are of the opinion that these rulings do not constitute reversible error.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

BAUSMAN, J., dissents.

[No. 12810. Department One. May 12, 1916.]

WILLIAM WAGNER, *Appellant*, v. TOM ALDERSON, *as Administrator etc., Respondent*, FRANK ELSHOLTZ *et al., Defendants*.[1]

COURTS—PROBATE COURTS—JURISDICTION—JUDGMENTS—FULL FAITH AND CREDIT. Superior courts being courts of general jurisdiction exercising powers in probate, a decree awarding administration upon adjudging the death of the deceased must be accorded the same full faith and credit as judgments in law or decrees in equity.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT — DECREE — JURISDICTION—FACT OF DEATH—DETERMINATION. Upon issuing letters of administration upon petition under the regular procedure, the court has jurisdiction to determine both the fact and time of the death of the deceased.

EXECUTORS AND ADMINISTRATORS — APPOINTMENT — DECREE — CONCLUSIVENESS—PRESUMPTIONS—FACT OF DEATH. A decree upon issuing letters of administration, adjudging the fact and time of death, is *prima facie* proof of the facts determined, in a subsequent action in which the administrator defends in his representative capacity.

SAME. Such a decree, reciting that it was entered upon proof taken, is not based upon any presumption of death from continued

[1]Reported in 157 Pac. 476.

absence; and the evidence not being in the record and no appeal taken, the correctness of the judgment cannot be inquired into.

Same—Appointment—Decree—Conclusiveness — Fact of Death —Parties Bound—Creditors. A creditor of an estate, as to whom notice to creditors was published, is so far a party to the probate proceedings as to be bound by the decree adjudging the fact and time of the death of the deceased, especially where he had filed a claim against the estate and the same had been allowed.

Subrogation—Payment of Liens—Rights of Mortgagee—When Volunteer. Upon failure of proof as to the execution of a mortgage, in a foreclosure action, plaintiff is not entitled to subrogation to the extent that money obtained on the mortgage was used to discharge liens on the property; as he was but a volunteer in paying taxes and judgment liens to clear the title for the benefit of his security.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 25, 1914, in favor of the defendants, dismissing an action to foreclose a mortgage, after a trial to the court on the merits. Affirmed.

Charles A. Schneider and *Frank A. Steele*, for appellant.

Tom Alderson, for respondent.

Morris, C. J.—This appeal presents the question of the effect of a decree in probate as to the fact and time of death. The facts are these: In October, 1907, Frank Elsholtz, a bachelor, approximately sixty years of age, left Seattle, presumably for Oregon or California. The record is very meager as to the reasons for his departure, the only evidence being the statement of one witness that Elsholtz was seeking relief from asthma. So far as this record goes, he has not been heard from since. On April 21, 1896, prior to an Alaska trip, Elsholtz executed a general power of attorney to one Seipman. He did not discharge this power of attorney upon his return from Alaska and it remained in full force at the time of his disappearance. On November 6, 1911, Seipman, acting under this power of attorney, executed a note and mortgage covering certain property of Elsholtz. On February 6, 1912, the state board of tax commissioners instituted proceedings in the superior court of King county, al-

leging the death of Elsholtz, intestate, on or about November 30, 1907, and praying for the appointment of an administrator of his estate. The regular procedure provided for by statute in such cases was followed and, on April 8, 1912, a decree was entered reciting, among other things,

"Proof under oath and in open court having been offered and taken, and the evidence being closed, and the said matter having been duly, regularly, and finally submitted to the court for consideration and decision, and all and singular, the law and the premises being now before the court here fully understood and considered, the court finds . . . that the said Frank Elsholtz died, intestate, on or about the 15th day of November, 1907, in the state of California . . . ."

The court thereupon decreed that letters of administration issue to Tom Alderson, as administrator of the estate, and the same were thereupon duly issued. On March 28, 1914, appellant, to whom the note and mortgage executed by Seipman as attorney-in-fact had been given, commenced foreclosure proceedings. Alderson, having been made a party, appeared as administrator of the estate, and after taking issue as to the giving of the power of attorney and the execution of the note and mortgage, set up the death of Elsholtz on November 15, 1907, the decree in probate, and his appointment as administrator. To this answer, appellant replied, denying the affirmative matter pleaded by Alderson, and alleging that Elsholtz was alive at the date of the execution of the note and mortgage. On the trial, appellant offered the usual proof in a foreclosure suit and rested. Alderson then offered the record in the probate proceedings, which was received over appellant's objection. No other evidence material to our inquiry was offered by either party. The lower court thereupon denied the foreclosure, and this appeal follows.

The error urged is the inadmissibility of the probate record and the insufficiency of the decree and letters of administration to prove the fact or time of death. This decree was entered over the objection of Seipman, who appeared in re-

sponse to the notice of hearing and contested the appointment of an administrator upon the ground that Elsholtz was still alive. The effect of a decree is to be determined largely by the character and jurisdiction of the court handing it down. Under our constitution, the superior courts are courts of general jurisdiction, having the same power and jurisdiction in probate proceedings as in actions at law or suits in equity. It follows, and such has been the uniform holding of this court, that decrees of superior courts exercising jurisdiction in probate matters are to be accorded the same full faith and credit as judgments in law or decrees in equity. *In re Bell's Estate*, 70 Wash. 498, 127 Pac. 100; *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433. It cannot be questioned but that the court had jurisdiction to determine both the fact and time of death, and having so adjudicated, its judgment must be given effect. *Davis v. Greve & Wilderman*, 32 La. Ann. 420; *Jeffers v. Radcliff*, 10 N. H. 242; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Holmes v. Oregon & California R. Co.*, 9 Fed. 229; *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001, 18 L. R. A. 242; *In re Paterson's Estate*, 146 N. Y. 327, 40 N. E. 990.

We do not think there is any question but that, under the issue, the probate record was admissible, and being admissible, the decree and letters of administration would be sufficient to make at least a *prima facie* case as to the fact therein set forth. This *prima facie* proof was the only evidence before the lower court upon the question here involved, and is sufficient to sustain the judgment. *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068; *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *Brickhouse v. Brickhouse*, 33 N. C. 404; *Milligan v. Bowman*, 46 Iowa 55; *Seibert v. True*, 8 Kan. 52; *Brubaker v. Jones*, 23 Kan. 411; *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. 299; *Jenkins v. Peckinpaugh*, 40 Ind. 133; *Lancaster v. Washington Life Ins. Co.*, 62 Mo. 121; *Hurlburt v. Van Wormer*, 14 Fed. 709.

Appellant contends that death is only presumed from the absence and non-report of a person after the full lapse of seven years. The judgment appealed from is not based upon any presumption of death, but upon the sufficiency of the probate decree and letters of administration to establish at least a *prima facie* case, which has not been rebutted. The effect of such presumption and the extent to which it would justify a decree might have been involved in an appeal from the probate decree, if it appeared from the record that the finding as to the fact and time of death was based entirely upon a presumption. That decree, from all that now appears, might have been based upon evidence justifying a finding of death, there being nothing in the record so far as we can observe that would justify a conclusion that death was based upon presumption alone. While the courts, in dealing with presumptions of death, have held that a presumption does not attach to a lapse of time less than seven years, they have also held that the fact of death may be found from the lapse of a shorter period where the circumstances and the evidence before the court warrants such a finding. *Matter of Losee's Estate*, 46 Misc. Rep. 363, 94 N. Y. Supp. 1082; *In re Ketcham's Estate*, 5 N. Y. Supp. 566. The decree in question recites that it was entered upon proof taken. What that proof was we have no means of knowing, nor shall we assume that the court was acting without proof of the fact and time of death and made its finding upon presumption alone. The correctness or incorrectness of the decree is not to be inquired into here. The only thing we have to determine is the faith and credit to be given it.

Appellant's chief reliance is upon *Carroll v. Carroll*, 60 N. Y. 121, 19 Am. Rep. 144, and *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238. Having cited New York and Federal cases in support of our holding, we briefly notice these two cases. The *Carroll* case was an action for the admeasurement of dower between the widow and the heirs. The only

evidence of the death of the testator was the record of the probate of his will. The court held such proof insufficient upon the ground that the proof given upon a probate of a will of a deceased husband has nothing to do with the question of the widow's right of dower in his real estate. The admission of the will to probate could not deprive her of her interest, nor its rejection in any way sustain it; hence the probate proceedings were wholly immaterial. The reasoning of the court sustains its ruling, but that reasoning is not apposite here because death was a jurisdictional matter which the court must determine before it could hand down its decree appointing an administrator or issue letters. And the death of Elsholtz prior to the execution of the mortgage would defeat its foreclosure.

In the *Tisdale* case, the action was to recover upon a life insurance policy. The only evidence of the death of the insured was the issuance of letters of administration. This proof was held insufficient. The basis of the decision is analogous to that in the *Carroll* case, in that the action upon the life insurance policy was a distinct and separate proceeding in which death must be established by proof competent under common law principles. The court, in its opinion, notes the fact that, when the administrator or executor is a party to the suit in his representative capacity, a different rule prevails. In this case, the administrator was a party in his representative capacity, as was also the attorney-in-fact.

Appellant urges he was not a party to the probate proceeding. He was a party in so far as there is any provision in our law for making him a party to such proceedings. At the time of the giving of notice of the application for the appointment of an administrator, appellant was a creditor of Elsholtz to the extent of the note. The notice of the filing of the petition was notice to creditors and all persons who, upon the death of Elsholtz, might claim an interest in his estate. Appellant cannot now be heard to say he was not a

party to the probate proceedings, and hence anything there done is of no effect as to him. He has, to some extent at least, recognized the effect of the probate proceedings, having filed a claim against the estate for the amount represented by the note, and the same has been allowed and will doubtless be paid in due course of administration.

Appellant asks, in the event the judgment be affirmed, that he be granted the right of subrogation to the extent that the money obtained on the mortgage was used in the discharge of liens against the property. This must be denied. Subrogation is not extended to money advanced by a volunteer or stranger. While some part of the money obtained from appellant—the amount not being disclosed—was used in paying taxes and a judgment for attorney's fees, appellant's only interest in these payments was to clear the title to the land for the benefit of his security. He was protecting his own interests and not moved by any consideration for the estate.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

ELLIS, J., concurs in the result.

[No. 12974. Department One. May 12, 1916.]

EMORY F. SHAFER, *Appellant*, v. TACOMA EASTERN RAILROAD COMPANY, *Respondent*.[1]

NEGLIGENCE — DANGEROUS OPERATIONS — DUTY TO VOLUNTEER—ASSUMPTION OF RISKS. One who was attracted to the scene of the lifting of a derailed engine, by reason of the element of danger, which he fully appreciated, is a mere licensee or volunteer to whom no duty was owed except not to wilfully and wantonly injure him, although when warned away he took up a place on property adjoining the right of way which he deemed safe; since he assumed the risk of apparent danger and cannot complain of want of care or unskillfulness whereby he was injured.

SAME—"LAST CLEAR CHANCE"—PRESUMPTIONS. In such case the doctrines of "last clear chance" and *"res ipsa loquitur"* have no application.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 23, 1914, dismissing an action for personal injuries, upon granting a nonsuit. Affirmed.

Govnor Teats, Leo Teats, and *Ralph Teats*, for appellant.

Geo. W. Korte (H. S. Griggs, of counsel), for respondent.

MORRIS, C. J.—Appeal from a judgment of nonsuit. On Sunday, July 12, 1914, respondent was attempting to raise a derailed engine. Appellant, living near by, was attracted to the scene through curiosity. Using his own language:

"I came over to see what was going on. I went out there to see something unusual; something great. I expected to see a demonstration; see something different from what I usually saw about lifting things. In the lifting of a big thing like that, there was an element of danger connected with it; that something might break or give away that I would be apt to see if I was around in a safe place."

Appellant was not the only one attracted to the scene. Many others were led to visit the place as spectators, crowding in upon the workmen until a policeman drove them back,

[1]Reported in 157 Pac. 485.

telling them to keep back on account of the danger. Appellant finally took a position on the edge of the borrowpit, about fifty feet away from the derailed engine, assuming he was in a safe position and could see all that took place. The method employed was to attach a cable from the wrecking train to the boiler of the engine and then pull toward the track with a rolling movement. In placing the cable around the engine boiler, it was placed back of some lugs, against which, on one of the pulls, the cable slipped. On making another pull, the lug snapped and was hurled to where appellant was standing, inflicting the injuries complained of.

The place where appellant was standing at the time he was injured was just off from the railway right of way; and it is contended, first, that his right of action is based upon the rule requiring those engaged in the use of machinery to use a proper degree of care to prevent injury to persons on adjoining property and those passing on adjacent streets; citing *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689; *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406; *Metz v. Postal Telegraph Cable Co.*, 72 Wash. 188, 130 Pac. 343, and like cases from this and other courts.

These cases have no application because of the lack of important essentials—failure to warn, and lack of knowledge of the dangerous situation. Here, there was both a warning given, and appellant frankly admits he knew there was an element of danger in the work, and it was, partly at least, because of this that he was attracted to the scene. Appellant was a mere licensee or volunteer, and his presence at the spot where he was injured is best understood by referring to his testimony previously quoted. It is this that determines the law against him. He appreciated the presence of danger, which means that the law charges him with the natural results of the thing he appreciated and understood. Knowledge of danger is, in law, knowledge of the dangerous results naturally and proximately flowing from that danger. *Nord-*

strom v. Spokane & Inland Empire R. Co., 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364. From his own testimony, it is clear that appellant knew and appreciated the dangerous situation. In fact, that was one of the attractions exciting his curiosity and inducing his presence. Knowing he was submitting himself to a known danger would be a voluntary submission to the natural and proximate results flowing from that danger.

In determining respondent's negligence, we must determine the duty it owed to appellant, since negligence occurs only where there is a breach of legal duty. That duty, in the case of licensees and volunteers, is not to willfully or wantonly injure. Not failing in this duty, responsibility for appellant's injury cannot be fastened upon respondent.

Appellant further contends his case is analogous to those where persons upon adjoining property are injured by articles thrown from moving railway trains. Negligence in those cases is predicated upon the duty of a railway company to keep its trains and other dangerous instrumentalities upon and within its right of way. This duty is due not only to owners of adjoining property, but to those who may be upon such property anticipating no danger and relying upon the duty of the railway company to protect them. The law always requires of any property owner the exercise of ordinary care in the use of his property and the agencies operated thereon so as not to injure property or persons on abutting premises, but that duty is not extended to those who voluntarily and knowingly make themselves a part of a dangerous situation, attracted by no motive other than curiosity or amusement. Such persons must take the risk as they find it, and cannot successfully complain of the unskillfulness or lack of due care on the part of those engaged in the work.

Pollock on Torts (Webb's), page 190, in speaking of this rule, says: "A man cannot complain of harm to the chances of which he has exposed himself with knowledge and of his free will;" and thus illustrates the rule:

"If I choose to stand near a man using an axe, he may be a good woodman or not; but I cannot complain of an accident because a more skillful woodman might have avoided it. A man dealing with explosives is bound, as regards his neighbour's property, to diligence and more than diligence. But if I go and watch a firework-maker for my own amusement, and the shop is blown up, it seems I shall have no cause of action, even if he was handling his materials unskillfully;"

citing *Ilott v. Wilkes*, 3 B. & Ald. 304, to the effect that there can be no recovery for injuries where a man voluntarily exposes himself to the mischief which has happened.

A somewhat similar English case is *Batchelor v. Fortescue*, 11 Q. B. Div. 474, where workmen were employed in excavating the earth for the foundation of a building. In the performance of the work, they used a steam crane and winch to which was attached an iron bucket. The deceased was standing by, watching the men at work, when the iron bucket fell upon him. Held, there could be no recovery, for the reason that the deceased voluntarily subjected himself to all the risks attending his being there.

This case is not unlike *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63, where the deceased went upon a trestle used in the construction of a jetty in search of work and, upon being refused, loitered about waiting for some of the men about to go off shift. While so waiting, he was struck by the sweep of a derrick used in unloading rock. We held that no duty rested upon defendant other than to refrain from willful injury.

In *Downes v. Elmira Bridge Co.*, 179 N. Y. 136, 71 N. E. 743, it is said:

"Where one enters a place where work is going on and he knows the nature of the work and the condition of the place, even if many others have been suffered to go there before him, he takes the risk of the operations of the workmen, who cannot reasonably be required to give further notice than the situation itself affords. Dangerous work in plain sight is

notice to a mere licensee. Every one knows that he is liable to meet with danger when passing close by a heavy object weighing many tons, which is being moved by machinery to its position."

Later on, the opinion refers to the fact that plaintiff "was not injured wilfully and wantonly, but by building operations lawfully and openly conducted in the usual way after he had knowledge, and unnecessarily placed himself in a position exposed to obvious dangers. A like case is *Currier v. Trustees of Dartmouth College*, 117 Fed. 44, where no recovery was permitted a student who was injured while watching workmen tear down a large chimney.

In *O'Brien v. Union Freight Co.*, 209 Mass. 449, 95 N. E. 861, 36 L. R. A. (N. S.) 492, a number of cases are cited to the effect that, whether persons in like situation to appellant be regarded as trespassers or licensees, the well settled rule is that the only duty of those engaged in lawful work upon their own property is to abstain from inflicting intentional or wanton injuries. If appellant could bring himself within the rule applicable to those who go upon dangerous premises, either by express or implied invitation, the law would be more favorable to his right of action. He cannot, however, make of himself other than a mere licensee or volunteer, and as to such persons no right of action is given when injury occurs from apparent dangers. *Matthews v. Bensel*, 51 N. J. L. 30, 16 Atl. 195; *Woolwine's Adm'r v. Chesapeake & O. R. Co.*, 36 W. Va. 329, 15 S. E. 81, 32 Am. St. 859, 16 L. R. A. 271; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. 463; Thompson, Negligence, § 987.

Appellant contends for the application of the "last clear chance" and "*res ipsa loquitur*" rules in aid of his recovery, but we see no application in either of these rules to the facts in the case.

The judgment is affirmed.

MOUNT, FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 13001. Department One. May 12, 1916.]

OLIVE COMPANY, *Respondent*, v. S. V. MEEK, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—PRESUMPTIONS. Error cannot be predicated upon sustaining an objection to a question where there was no offer of proof as to what the answer would have been; since prejudice must affirmatively appear.

Appeal from a judgment of the superior court for Whitman county, Back, J., entered April 24, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a promissory note. Affirmed.

John W. Mathews (Neill & Burgunder, of counsel), for appellant.

Allen, Winston & Allen and *F. L. Stotler*, for respondent.

MORRIS, C. J.—In a suit on a promissory note, appellant, who was sued as an indorser, alleged in his answer that he was induced to indorse the note through the fraud of one Reid, the secretary of the corporation maker, in stating to appellant that, if he would indorse the note, it would not be negotiated until other indorsements had been procured. At the trial, Meek, testifying in his own behalf, was asked whether or not Reid made any representations under which he indorsed the note. An objection was sustained to this question. He was then asked, if he indorsed the note at the request of Reid, to state the circumstances under which he did so. To this question, an objection was sustained. The witness was then excused by his counsel. Error is now predicated upon the exclusion of this testimony.

Error will never be presumed, but must affirmatively appear from the record. Counsel for appellant did not follow up the ruling of the lower court by making any offer to prove, and in the absence of such an offer we cannot assume

[1]Reported in 157 Pac. 460.

what the answer of the witness would have been. Hence, it cannot be determined from the record that the ruling complained of was prejudicial. *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551; *Chlopeck v. Chlopeck*, 47 Wash. 256, 91 Pac. 966; *Hightower v. Union Sav. & Trust Co.*, 88 Wash. 179, 152 Pac. 1015.

This being the only error complained of, the judgment is affirmed.

MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13026. Department One. May 12, 1916.]

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Appellant*, v. SPOKANE MERCHANTS' ASSOCIATION, *Respondent*.[1]

PRINCIPAL AND SURETY—BOND OF CONTRACTOR—PUBLIC WORK—FILING CLAIMS—WAIVER. Where the state and a contractor on public work agreed to arbitrate disputes as to the classification of the work and to disburse the amounts found due by payment 1st, of all unpaid labor claims, 2d, claims of materialmen, and 3d, the balance to the contractor, the agreement for arbitration waived the provisions of the statute requiring the filing of claims against the contractor's bond, given to secure lien of labor and materials furnished under the contract.

COSTS—PARTIES LIABLE—TRUSTEE OF FUND—PREVAILING PARTY—APPORTIONMENT. In an action for an accounting of a fund of nearly $30,000, deposited with a trustee to be disbursed in the payment of labor and material claims, costs should not be awarded against the trustee, where it performed its duties in good faith, making errors only in minor particulars, and the plaintiff prevailed to the extent of only $122, upon a claimed balance of over $6,000.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 21, 1915, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

[1]Reported in 157 Pac. 464.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellant.

J. B. Campbell and *Samuel R. Stern*, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover from the defendant $6,321.56. The complaint alleged that, on the 1st day of June, 1911, there was due to Ilse & Elliott from the state of Washington on account of certain road construction the sum of $29,935.61; that Ilse & Elliott were indebted for labor and material furnished them on account of said road in the sum of $26,729.86; and there were other claims being asserted, none of which were their debts; that, at that time, for the purpose of discharging their debts, and for the purpose of protecting labor and materialmen for labor and material furnished in the construction of said road, the state of Washington and said Ilse & Elliott agreed to deposit said money with the defendant, Spokane Merchants' Association, to be used for the payment of such labor and material claims owing by Ilse & Elliott.

"That said Spokane Merchants' Association received the said fund of $29,935.61 on the terms and conditions hereinbefore alleged, and thereafter disbursed to the payment of the said indebtedness of said Ilse & Elliott the sum of $23,614.56, and no more, and at all times since has held the remainder of said fund, to-wit: $6,321.05, and has failed and refused, and still fails and refuses, to account to, and pay the same to, said Ilse & Elliott."

For answer, the defendant admitted that it had received from the state of Washington the sum alleged, but denied that it had failed or refused to pay the said money out as directed, and denied that it had failed or refused to account to Ilse & Elliott for the money intrusted to it as aforesaid. There were some additional affirmative answers which it will not be necessary to notice.

Upon these issues, the case was tried to the court without a jury, and findings and a judgment were entered to the effect that $1,336.11 was paid without authority by the defendant, and the defendant was ordered to pay this sum to other creditors who were not paid in full; and $122.89 wrongfully paid upon one claim was ordered paid to the plaintiff. The plaintiff has appealed from that judgment.

The evidence has not been brought here for review. The facts, as found by the trial court, are, in substance, as follows: That, on June 9, 1910, Ilse & Elliott entered into a contract with the state of Washington for the construction of state aid road No. 71, in Spokane county, Washington; that, at the time this contract was entered into, a bond was given, as required by law, to the state of Washington, for the faithful performance of the contract; that thereafter Ilse & Elliott entered upon the performance of their contract; that, on September 10, 1910, they sublet a portion of the work to one Nick Mandic, who agreed to perform a certain portion of the road work upon the same terms and at the same prices as were provided for by the original contract between Ilse & Elliott and the state; that Mandic agreed to pay Ilse & Elliott the sum of $2,000 for the privilege of doing this work; that a bond was entered into by Mandic for the faithful performance of his part of the work, which bond ran in favor of Ilse & Elliott; that, thereafter, on November 28, 1910, Ilse & Elliott were indebted in a large amount for labor and material furnished in the performance of their contract, which debts they were unable to pay; that Mandic likewise was indebted in a large sum for labor and materials furnished in the performance of his part of the work, which he was unable to pay; that Ilse & Elliott were claiming they had not received proper classifications from the state of Washington on the work which had been performed by themselves, and also by Mandic under the subcontract; that negotiations were had between Ilse & Elliott and the state with reference to the disputes as to the amount due them for

the work performed, and it was agreed that the disputes should be left to arbitration, and that any amount found due by the arbitrators should be binding upon the parties, and should be disbursed,

"(1) All unpaid labor claims which represented contractual obligations on the part of said Ilse & Elliott, and which had been performed on said state aid road No. 71; (2) the remainder to the payment of all materialmen and all others who had claims against Ilse & Elliott or the state of Washington by virtue of the construction of said state aid road No. 71 after all laborers had been paid; (3) all amounts remaining to be paid to said Ilse & Elliott;"

that, prior to December 20, 1910, certain of the creditors of Ilse & Elliott placed their claims with the defendant for collection, and certain of the creditors of Nick Mandic had placed their claims against him with the defendant for collection; that, on or about that date, for the purpose of protecting their creditors, Ilse & Elliott gave an order in favor of the defendant, on the state highway board, for all moneys due or to become due under the arbitration contract; and, at the same time, Mandic gave an order upon Ilse & Elliott in favor of the defendant for all money due or to become due on account of the subcontract with Ilse & Elliott, which order recited:

"The intent and purpose of this order is that all moneys due me may be paid to the Spokane Merchants' Association and they pay said moneys out to my creditors for material or labor supplied and performed upon said road as described in said arbitration contract hereinbefore referred to;"

that, thereafter, the arbitrators found that there was due a balance of $29,935.61 from the state to Ilse & Elliott for work performed by them, and also by Mandic; that this sum was thereafter paid to the defendant upon the orders hereinabove referred to; that this sum was not sufficient to pay all undisputed and disputed claims, but was sufficient to pay a little more than eighty-one per cent of such claims; that the defendant, after receiving the money, investigated the

character of the claims, paid all undisputed claims, and determined that most of the disputed claims were valid and paid them, taking a bond from the holders of disputed claims to the effect that, if the disputed claims should turn out to be wrongfully paid, that the money would be refunded. The court found that some of these claims were wrongfully paid, for which the appellant was not liable, aggregating $1,336.11, and ordered that this money should be applied in payment of claims which should have been paid, and that no part of it should be paid to Ilse & Elliott, or their assignee, the plaintiff in this case.

The court also found as follows:

"None of the creditors whose names are listed under either labor or material claimants in the disputed items heretofore mentioned, ever filed any claims in the office of the Highway Commission as provided by the statutes of this state; and Ilse & Elliott, by making the agreement for arbitration with the state of Washington and by giving the orders mentioned in findings 18 and 19 and by making the agreement with defendant to receive the sums due and disburse same as stated, waived the provisions of the statutes of this state with reference to the filing of claims."

The appellant makes two contentions here: First, that it was the duty of the holders of disputed claims to file the same under the statute with the board of highway commissioners so that the same should become a lien against the bond given by Ilse & Elliott to the state, and that the application of the fund in payment of claims not enforceable against the bond was unlawful.

The disputed claims were contracted by Mandic in the performance of his subcontract. The evidence is not brought here for review. We are, therefore, bound by the findings of the trial court. As we have seen, the trial court found that, in making the agreement for arbitration and in making the agreement that the defendant receive the sums due and disburse the same as stated, the defendant waived the provisions of the statute of the state with reference to the filing of the

claims. We think this must of necessity have been correct; otherwise, the state would not have turned the money over upon the order of the contractors until the debts were paid. The arbitration was, in effect, a settlement of the differences between the state and Ilse & Elliott, the principal contractors. Mandic, being a subcontractor, was a creditor of Ilse & Elliott. They received pay for his work from the state; and Mandic gave an order on Ilse & Elliott in favor of the defendant in order that it might pay the claims for labor and material furnished in the construction of the road. It must of necessity, we think, have been the idea of all the parties interested that the defendant should pay both the disputed and the undisputed claims which were, or could have been at that time made a lien upon the money, either in the hands of the state or in the hands of the defendant in trust. We have no doubt that it was the intention of the parties to have these claims paid if they were justly due and entitled to be paid for work and material furnished upon the contract. The fact that the court found that there was a waiver of the statute is conclusive that the parties so intended, especially when no evidence is brought here upon the question.

The appellant next contends that the court erred in awarding costs in favor of the defendant. The defendant in this case was a trustee. The money due Ilse & Elliott from the state, and also due Mandic from Ilse & Elliott on the contracts, was placed with the defendant to be disbursed to creditors entitled thereto. The court found that, acting in good faith, the defendant had disbursed all the money; and also that there was not enough money to pay all the claims. The action was clearly one for an accounting. It is strictly an equitable action. While the plaintiff benefited to the extent of about $122, we think that fact, under the circumstances of the case, did not require the court to tax the costs in favor of the plaintiff. The defendant was a trustee by authority of Ilse & Elliott and Mandic. It performed its

duties in good faith; and even though it erred in minor particulars, it ought not, it seems to us, to be required to pay the costs of this case, where there was no bad faith and where the plaintiff did not prevail to any substantial amount. In such cases, the court is authorized to apportion the costs, or tax them all against either party. *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652; *Croup v. DeMoss*, 78 Wash. 128, 138 Pac. 671; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28.

We find no error, and the judgment is therefore affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 13031. Department One. May 12, 1916.]

D. A. ANDERSON *et al.*, *Respondents*, v. F. E. LANGFORD, *Appellant*.[1]

SALES—CONDITIONAL SALES—DELIVERY — SEPARATE PARTS — STATUTES. Where, upon delivery of the principal part of a mangle, substantial parts consisting of a shaft and roller were found missing, and such parts were delivered with reasonable dispatch and there was no bad faith, the filing of a conditional sales contract within ten days after delivery of the completed machine is within time, under Rem. & Bal. Code, § 3670, providing that a conditional sale shall be absolute as to creditors unless within ten days after taking possession by the vendee a memorandum of the sale shall be filed for record in the auditor's office.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 6, 1915, upon findings in favor of the plaintiffs, in replevin, after a trial to the court. Affirmed.

Lucius G. Nash and *F. E. Langford*, for appellant.

Zent, Powell & Redfield, for respondents.

[1]Reported in 157 Pac. 456.

MOUNT, J.—In an action in replevin tried to the court without a jury, findings were made and a judgment entered in favor of the plaintiffs. The defendant Langford has appealed.

It appears that the respondents, on December 27, 1913, sold a mangle to T. Hondi upon a conditional sale contract. A day or two afterwards, the principal parts of the mangle were delivered to Mr. Hondi. While installing the mangle, it was discovered that certain parts, consisting of a shaft and certain rollers, were missing. Thereafter the respondents supplied the missing parts. On January 9, 1914, the respondents filed the conditional sale contract in the auditor's office in Spokane, where the property was located.

The principal question is whether the conditional sale contract was filed within time. The appellant contends that the delivery of the principal parts of the mangle was a constructive delivery of the whole machine, and, for that reason, it is argued the conditional sale contract should have been filed for record within ten days after the delivery of the principal parts of the mangle.

The statute, Rem. & Bal. Code, § 3670 (P. C. 349 § 35), provides:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

It is conceded that the principal parts of the mangle were delivered more than ten days prior to the recording of the conditional sale contract. It is also conceded that the conditional sale contract was recorded within ten days after the completed machine was delivered. So that the simple ques-

tion is whether the conditional sale contract is void as to subsequent creditors because it was not filed within ten days after the vendee had taken possession of the principal parts of the machine.

We think the contract was filed within time, because the delivery was not complete until the whole machine was delivered by the vendor to the vendee. It appears from the evidence that the missing parts consisted of a driving shaft and certain rollers, weighing several hundred pounds. It seems plain that, if these parts, being material parts, had not been delivered by the vendor to the vendee, the sale would not have been completed, and the vendee might have rescinded the contract by reason of the fact that the whole machine was not delivered. In other words, the rule of constructive possession in a case of this kind does not apply. The vendor had agreed to sell a complete machine. He had delivered a part, and a material part was not delivered. After the completed machine was delivered, and within ten days, the conditional sale contract was filed for record. The contract was not completed until the whole machine was delivered. There are no doubt many cases where a complete machine may not be delivered at once. The fact that parts are delivered at different times cannot be said to be a delivery of the complete machine until the whole is delivered to the vendee.

There is no charge of bad faith or an attempt to evade the statute. The parts delaying complete delivery were substantial parts, and were furnished and delivered with reasonable dispatch; and thereupon within ten days the contract was filed for record. We are satisfied, therefore, that the trial court properly held that the conditional sale contract was filed within time when it was filed within ten days after the complete machine was delivered to the vendee.

The judgment must therefore be affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 13115. Department Two. May 12, 1916.]

B. J. LYONS *et al.*, *Respondents*, v. RALPH INGLE *et al.*, *Appellants*.[1]

WATERS AND WATER COURSES — PRIVATE DITCH — PRESCRIPTIVE RIGHTS—EASEMENTS—LICENSE TO USE. Plaintiffs can gain no prescriptive right to an easement in a ditch on defendant's adjoining land diverting water controlled and used by defendants for their own use, from the fact that they used surplus waters from a pool formed near the boundary line and annually assisted in cleaning out the ditch, where such use was not exclusive, and they evidently were mere licensees, and there was no evidence from which a certain flow could be assigned to them.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered May 25, 1915, upon findings in favor of the plaintiffs, in an action in equity, tried to the court. Reversed.

H. N. Martin, Merritt, Lantry & Merritt, and *Merritt, Jesseph & Merritt*, for appellants.

W. E. Southard, for respondents.

BAUSMAN, J.—This is a suit to compel defendants to recognize in plaintiffs the right to use a ditch upon defendants' land, together with a flow of water through it to that of plaintiffs'. The two farms adjoin, and the waters of Crab creek, running through defendants' land in a main channel, are turned aside within the latter tract in the direction of plaintiffs'. According to plaintiffs, this diversion is by a natural channel, but we are satisfied that there is no such channel and only an uncertain slough, and that the water was artificially extended by defendants' grantor. Thus extended, it forms, not far from the dividing line of the two places, a sort of pool from which it was connected with plaintiffs' tract by a ditch. In this ditch plaintiffs claim

[1]Reported in 157 Pac. 460.

an easement a sufficient number of years before the commencement of the action to establish a legal right.

The evidence clearly preponderates against plaintiffs. They concede that the ditch was built in the first instance at the request and for uses of the defendants' grantor, that upon his land it has always been used concomitantly for his own agriculture, that it has been relocated without their being consulted beforehand, and that at no time was any use of theirs in it exclusive. The surplus waters they did enjoy, but it is not clear that at any time they ever got more than the surplus. Nothing indicates that they ever received any water other than what defendants had to spare.

Plaintiffs are not formal appropriators from a public stream, conducting it for their own sole purposes through a neighbor's farm, but merely tolerated tappers upon another's land, diverting only from a pool or basin within that land. Nor are they able to state even the quantity which is to go to them. There was no proper evidence from which the lower court could assign them an exclusive right to a certain flow. That they were mere licensees is evident at every turn of the testimony and frequently from their own. We see nothing in the circumstance that they did, by their own labor, annually clean this ditch and trim its edges, a task that they concede would not take above five days in the year and which would be but a neighborly return.

Nothing is to be more jealously guarded than these encroachments. A succession of friendly courtesies, however long extended, must not be hastily construed into legal right. It being manifest that there was at times not enough water even for defendants, the proof should be clear that would give part away forever.

Judgment is reversed and the action ordered dismissed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13143. Department One. May 12, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. BATES & ROGERS CONSTRUCTION COMPANY, *Respondent*.[1]

COMMERCE—INTERSTATE COMMERCE — WHAT CONSTITUTES — STATE INDUSTRIAL INSURANCE—STATUTES. The work of repairing a bridge, continuously used by an interstate railroad, by placing new concrete piers underneath it to carry steel braces for its support, is work in interstate commerce, and so not within the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1, rendering certain employers liable for insurance premiums.

SAME—INTERSTATE COMMERCE — INDEPENDENT CONTRACTORS — FEDERAL EMPLOYERS' LIABILITY ACT. Independent contractors repairing a railroad bridge used in interstate commerce, are within the provisions of the Federal employers' liability act, since by § 5 (Comp. St. 1913, § 8661), any contract intended to enable any common carrier to exempt itself from liability created by the act is void to that extent; and hence are not within the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1, rendering certain employers liable for insurance premiums.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 28, 1915, in favor of the defendant, upon stipulated facts, in an action to recover state insurance premiums. Affirmed.

The Attorney General and *John M. Wilson, Assistant*, for appellant.

Allen, Winston & Allen and *Danson, Williams & Danson*, for respondent.

MOUNT, J.—This action was brought to recover premiums alleged to be due the industrial insurance department of the state upon the pay roll of the respondent while engaged in the construction of concrete piers for a bridge across the Spokane river for the Spokane International Railway Company.

[1]Reported in 157 Pac. 482.

The facts were stipulated, and are, in substance, as follows: The Spokane International Railway Company owns and operates a line of railroad engaged in interstate commerce. Upon its line of railroad, is a bridge, known as bridge No. 1, across the Spokane river, in Spokane county, which bridge is a part of the main line of the railway company and used by it in the operation of its trains as a common carrier of freight and passengers between different states of the United States and Canada.

On the 14th day of July, 1911, the public service commission of this state made and served an order upon the railway company to repair this bridge. Thereafter, in December, 1912, the Bates & Rogers Construction Company entered into an agreement with the railway company for the construction of concrete piers for this bridge. These piers were eventually to be used for a new bridge to take the place of the old wooden bridge which was being used temporarily. The bridge was continuously used by the railway company while these piers were being built beneath it. After the completion of the piers, the railway company constructed steel braces which supported the old bridge upon the concrete piers.

In the course of the construction of the concrete piers, the Bates & Rogers Construction Company employed laborers from time to time, and the pay roll thereof amounted to the total sum of $10,834.

The court, upon the stipulated facts, found substantially as above stated, and specifically made two findings as follows:

"That on the 14th day of July, 1911, the public service commission of the state of Washington made an order requiring that said bridge No. 1 be repaired, and that pursuant to said order, and during the years 1912 and 1913, the defendant, Bates & Rogers Construction Company, was employed as agent, servant, and employee of said railroad company to repair said bridge No. 1, and to reconstruct a portion thereof by the erection of concrete piers upon which

the said bridge was supported when completed. . . . That the work of repairs upon said bridge was required and necessary in order to render said bridge safe for use of said railroad company in its business as a common carrier of interstate and foreign traffic, both freight and passenger."

Upon these facts, the trial court concluded that the work of the Bates & Rogers Construction Company in the construction of these piers and the repair of the bridge was a part of the interstate commerce in which the railway company was engaged, and for that reason, the employees of that company were not within the provisions of chapter 74 (Laws 1911, p. 345; 3 Rem. & Bal. Code, § 6604-1 *et seq.*), of the laws of this state relating to the industrial insurance department, but were engaged in interstate commerce; and for that reason dismissed the action. The state has appealed.

The *Attorney General* makes two contentions: First, that the work performed by the Bates & Rogers Construction Company was not a part of the bridge itself, and no part of the operating property of the Spokane International Railway Company, and hence it was not a part of the interstate commerce in which the railway company was engaged; and second, that the Bates & Rogers Construction Company was an independent contractor, and therefore liable for the premium due the industrial insurance department of the state.

Upon the first point, it is argued that the concrete construction work was new work of an independent character, and was not a part of the bridge used in interstate commerce. *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, and *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, are cited to that effect. In the *Pedersen* case, where the plaintiff was engaged in repairing a bridge, and his employment at the time of his injury was to carry the bolts to be used in such repairs, the court, at page 151, said:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound

economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? . . . Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

In *Horton v. Oregon-Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, an employee was operating a pumping plant for the purpose of supplying water to locomotives of a railroad engaged in interstate commerce. This employee was on a handcar going to his work. We held that his work was within the provisions of the Federal Employers' liability act. In that case, we referred to *Colasurdo v. Central R. Co.*, 180 Fed. 832, where it was said:

"The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time;"

and many other cases there to the same effect. See, also, *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893; *Columbia & P. S. R. v. Sauter*, 223 Fed. 604.

The appellant relies upon the expression in the *Pederson* case as follows:

"Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce."

It is probably true that, if a new bridge were being built and had not been accepted and placed in use by the railway company in its interstate commerce, such bridge, until it was placed in use, could not be said to be a part of the road engaged in such commerce. But that is not the fact here. The piers in question were built underneath the old bridge; they were built for the purpose of repairing the bridge and making it safe so that it might be used in safety for the purposes of the road. It is, no doubt, true that, while the concrete was being placed in the piers, the bridge did not rest thereon. But the trial court found the fact that this was not a new structure but was a repair of the old structure. It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.

The Bates & Rogers Construction Company, and their employees were engaged in the repair of the bridge which was being used in interstate commerce. They were, there-

fore, under the authorities above cited, engaged in interstate commerce, and were not within the act of this state making the Bates & Rogers Company liable for premiums due the industrial insurance department.

It is next contended that the Bates & Rogers Construction Company were independent contractors. It is probably true that that company was an independent contractor. But that fact is unimportant, because § 5 of the Federal employers' liability act provides that:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." Comp. St. 1913, § 8661.

If the purpose of employing the Bates & Rogers Construction Company to repair this bridge was to avoid the Federal Employers' liability act, then, under the terms of that act, that contract would be void. We are satisfied that there was no intent on the part of either the railway company or the Bates & Rogers Construction Company, by the contract which they entered into, to evade that act. The contract was one of employment by the railway company of the Bates & Rogers Construction Company to do a particular work upon the repair of this bridge. The Bates & Rogers Construction Company, and all of its employees, were employees of the railway company, within the meaning of the Federal Employers' liability act; and the fact that the Bates & Rogers Construction Company was an independent contractor would not affect the nature of the employment.

We are satisfied, therefore, that the trial court correctly concluded that the work done upon this particular bridge in the repair thereof, was work done in interstate commerce, and was not within the law of this state relating to the industrial insurance department. The judgment is therefore affirmed.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 13216. Department One. May 12, 1916.]

IDA M. GLAZE, *Respondent*, v. PULLMAN STATE BANK *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—TITLE—ESTOPPEL—IN PAIS. A married woman holding separate property standing in her own name is not estopped to assert title thereto from the fact that her husband, in obtaining a loan, made a financial statement to the bank including her property as property which "we own," where, upon request, she refused to sign the statement, the husband had other property, and the bank did not rely wholly upon the statement; as there was no active participation by her, and the bank was bound to notice her record title.

SAME—WIFE'S SEPARATE PROPERTY—COMMUNITY DEBTS. The wife's of improvements on the wife's separate property after marriage does not make it community property, where the wife paid for the improvements with her separate funds.

SAME—COMMUNITY PROPERTY—EVIDENCE. The fact that a husband joined in a mortgage upon the wife's separate property is not conclusive evidence that the same was community property.

SAME—WIFE'S SEPARATE PROPERTY—COMMUNITY DEBTS. The wife's separate property is not liable for the community debt of her husband.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered May 13, 1915, upon findings in favor of the plaintiff, in an action to restrain an execution sale. Affirmed.

D. C. Dow, for appellants.

M. S. Jamar and *H. J. Welty*, for respondent.

MOUNT, J.—At the suit of the respondent, the trial court restrained the appellants from selling lots 6 and 7, block 11, of Reaney's Second addition to Pullman, in Whitman county, under an execution issued upon a judgment wherein the Pullman State Bank was plaintiff and H. A. Glaze, the husband of the plaintiff, was defendant. This appeal is from that judgment.

[1]Reported in 157 Pac. 488.

It appears that, at the time Mrs. Ida M. Glaze was married to H. A. Glaze, she was the owner of the two lots in question. After their marriage, the lots were improved by the erection of two dwelling houses thereon. The evidence shows that these improvements were made from the separate funds of Mrs. Glaze. The property has all the time been held of record as her separate property.

Mr. Glaze, in the year 1913, was engaged in contracting work. He applied to the Pullman State Bank for a loan. The cashier of the bank at that time requested him to make a statement of his financial condition, and he made a statement wherein he said: "We own the following property: Lots 6 and 7, Block 11, Reaney's Second Addition to Pullman, $5,000." The statement also described other real estate and personal property; so that the total estimated value amounted to $13,540. This statement was signed by Mr. Glaze alone. Mr. Glaze testified that the cashier of the bank requested him to have his wife sign the statement; that he asked his wife to sign it and she refused to do so. Thereafter he filed the statement with the bank, and it subsequently made loans to him for which it afterwards sued him upon his personal promissory notes, and recovered a judgment for $3,436.70, with interest, attorney fees, and costs. Thereafter an execution was issued upon the judgment and levied upon the lots in question. Mrs. Glaze then brought this action, with the result above stated.

The appellants make two principal contentions: First, that Mrs. Glaze is estopped to deny the community character of the property levied upon; and second, if she is not so estopped, that the improvements which have been placed upon the property after marriage are community improvements; and that the property should be sold and the value of the wife's separate property deducted from the selling price, and the balance applied upon the judgment.

The estoppel claimed by the appellants is based upon the fact that H. A. Glaze furnished the statement of his financial

worth to the bank with the knowledge and consent of Mrs. Glaze; that the bank loaned the money relying upon that statement; and Mrs. Glaze is now estopped to say that the property is not community property. The appellants cite *Curtis v. Janzen*, 7 Wash. 58, 34 Pac. 131, where it is said:

"The rule that whenever a person has held out another as his agent, or authorizes him to act in a given capacity, or has knowingly and without dissent permitted such acts, and accepted the fruits of them, he will be bound by such acts so far as necessary to protect innocent parties who have dealt with such agent, is so elementary and so well established that the citation of authorities in support of it is not called for here. The testimony in this case is comparatively brief, but it convinces us that the allegations of the complaint are true; that the Janzens conspired together to fraudulently deprive the respondent of his rightful security, and Mrs. Janzen, being a party to such conspiracy, is estopped from urging the defense that she urges here."

It appears in that case that the Janzens had conspired together fraudulently to deprive the respondent in that case of his rightful security. We think that authority does not apply here, because in that case there was an active participation of Mrs. Janzen in the conspiracy to defraud. It is not claimed in this case that Mrs. Glaze actively or otherwise participated in any fraud. When she was requested to sign the statement she refused to do so; and she never did sign it. The statement upon its face shows that Mr. Glaze was worth about $8,000 over and above these two lots, which stood in the name of his wife as her separate property. And while there is evidence in the record tending to show that the money was loaned to Mr. Glaze upon the strength of this statement, the evidence also shows that the bank did not rely wholly upon this statement, but relied upon Mr. Glaze's personal honor. In other words, it does not appear in the record that the bank in making the loans to Mr. Glaze relied wholly upon this particular statement. The fact that Mrs. Glaze refused to sign the statement does not, it seems

to us, make her an active participant in any false statement which was made by her husband to the bank, if any such statement were made.

In a note to *Trimble v. State ex rel. Stevens*, 57 Am. St. 178, the rule is stated as follows:

"In order to estop a married woman by matter *in pais*, it must appear that there has been a false representation or concealment of material facts by her, and that the party to whom such representation was made, or from whom such facts were concealed must have been ignorant of the existence of the facts concealed or of the falsity of the representation and must have relied upon its truth."

There was no representation in this case by Mrs. Glaze at all. The only representation made was by Mr. Glaze. He said in the statement, "We own the following property." Among the property described were the lots in question. She made no such representation, and all she did was to refuse to sign the statement which her husband asked her to sign. There was, therefore, no active participation by Mrs. Glaze in any statement that was made by Mr. Glaze to the bank.

The deed to these lots, showing that the title stood in Mrs. Glaze was of record, and the bank, of course, was bound to take notice of that fact, especially when Mrs. Glaze did not sign the statement made by her husband. We do not think it was her duty, even though she knew her husband was borrowing money at the bank, to go to the officers of the bank and say to them that certain property which appeared of record as her separate property was her separate property. That fact was already apparent of record. We are, therefore, satisfied that there is no estoppel on the part of Mrs. Glaze to assert her title to the property.

The appellants next contend that, even if there is no estoppel, H. A. Glaze has a community interest in the property by reason of the improvements placed thereon after his marriage to Mrs. Glaze. The record shows that two houses were

built upon the lots after the marriage. One of the houses was built by Mr. Glaze, who was a contractor engaged in building houses. But the testimony is quite clear that Mrs. Glaze employed her husband to build the house, and paid him for it out of her separate funds.

The record also shows that Mr. Glaze joined his wife in executing a mortgage upon the lots. But the fact that Mr. Glaze joined his wife in the mortgage for $1,800 upon these lots is not conclusive evidence that the lots were community property. In the case of *Nicholson v. Kilbury*, 88 Wash. 196, 145 Pac. 189, we said:

"The fact that the respondent joined in the execution of certain notes and mortgages is readily explained by the well known fact that the paper of a married woman is seldom taken without requiring that her husband join therein."

That was clearly the purpose of Mr. Glaze joining in the mortgage which was made thereon by Mrs. Glaze. The money borrowed and secured by the mortgage was placed in the improvements on the property, and the reason for Mr. Glaze joining in the mortgage is clearly explained.

We fail to find anything in the record that would justify us in now finding that Mr. Glaze has any community interest in these lots or the improvements thereon. The record shows clearly that the property is the separate property of Mrs. Glaze, and, therefore, that it is not liable for a community obligation of Mr. Glaze.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 13263. Department Two. May 12, 1916.]

EVERGREEN FARM, *Respondent*, v. ATTALIA LAND COMPANY, *Appellant*.[1]

WATERS AND WATER COURSES—IRRIGATION COMPANY—NEGLIGENCE—EXEMPTION BY CONTRACT—PUBLIC POLICY. An irrigation company cannot exempt itself from negligence by contracts for supplying water limiting its liability to cases of gross negligence, as it would be against public policy.

TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY. An objection to a witness' referring to a memorandum and stating certain items of expenditures, as "incompetent, irrelevant, and immaterial." is unavailing as an objection to testifying to the sums he had actually paid, instead of the sums "reasonably" expended.

DAMAGES—FLOODING LANDS—EXPENSES IN MINIMIZING—MEASURE. In an action for damages to land flooded, and for the expense of pumping to minimize the injury, the true measure of damages as to the pumping is the reasonable cost or value and not the amount disbursed.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered June 14, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort, tried to the court. Reversed.

Pedigo & Smith and *A. E. Gallagher*, for appellant.

Grosscup & Morrow, for respondent.

BAUSMAN, J.—Plaintiff's farm is irrigated from the canals of defendant, which is now sued in damages from flooding. These damages are to land and improvements, in removal of a dwelling and baled hay, and lastly in expense of buying at defendant's alleged request, and during several seasons operating, a pumping engine to minimize the injury. The verdict of the jury, which was general, exceeds the total of the final group of items.

At the threshold we find a written agreement of plaintiff in buying the land that mischiefs of this sort should be

[1]Reported in 157 Pac. 487.

charged against the irrigation company only in case its negligence was gross. On that basis the defendant offered and the lower court rejected instructions, the jury being advised that defendant was liable for ordinary negligence. The lower court was correct. Defendant is a corporation of the public service class, which exercise eminent domain and which, while allowed private profits, exist for public uses. It is clearly subject to the policy that forbids these creatures to exempt themselves from negligence by contract.

Error is assigned on the admitting of proof under the following situation: Plaintiff's witness Loose, having said that he could state the expense of minimizing the damage, was asked:

" 'Refer to any memorandum that you have made yourself and state what you have expended in years 1912, 1913, and 1914 prior to December, 1914.' (Question objected to 'for the reason that it is incompetent, irrelevant, and immaterial.' Objection overruled and exception allowed.")

The witness then answered that he did not have the memorandum after all but could give the amounts, which he then stated, for the purchased engine and for labor and material in the pumping during three years; nor was there other testimony or objection on this head.

The sweeping formula, "incompetent, irrelevant, and immaterial," is generally meaningless. We have had occasion to rule adversely on it before. *Anderson v. New York Life Ins. Co.*, 34 Wash. 616, 76 Pac. 109; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102. In this instance, one would say that the objection was merely against referring to the memorandum. Indeed, this may be all that counsel had in mind then, for when the witness did give the data without the memorandum, the objection was not renewed. Yet now it is urged in this court as good against a testifying to sums actually paid, instead of to sums *reasonably* disbursed. This

use of the objection we cannot now sustain. Nor does *Hunt v. Allison*, 77 Wash. 58, 137 Pac. 322, aid the objector, for we distinctly noted there that the objection was faulty, and that it was in proffered instructions and by moving to take the case from the jury that the objector had properly supplemented it. That case accordingly came here after opportunity for the lower court to correct error, and we have no precedent for reversal under an objection so ambiguous as this.

The final point is as follows: The lower court instructed the jury that plaintiff could recover its expense incurred in "his efforts by way of pumping and the installation of machinery for that purpose," without any qualification. The jury were not advised of the true measure, the reasonable cost or value and not the disbursed amount. *Torgeson v. Hanford*, 79 Wash. 56, 139 Pac. 648.

To allow mere disbursement is an error particularly plain here in the item of the engine, which plaintiff still has and which presumptively is of value, but the whole price of which he is allowed to get back, while he keeps the machine without deduction of its resale value. Nor can we say that the lower court was not advised of this point, for the record discloses an exception taken to this instruction, and while the exception does not particularize its grounds, the record does show that the defendant "stated its exceptions" to the lower court and that there was a motion argued for new trial. It would be going too far to say that this defendant did not afford the lower court an opportunity to revise the error, nor can we adopt the theory that defendant should be reckoned as having acquiesced in faulty proof. This is not, either, a case of appellant's complaining of what was merely omitted, but on the contrary, of what was erroneously done.

The judgment is accordingly reversed, the verdict ordered to be set aside, and a new trial granted.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

ON PETITION FOR REHEARING.

[Decided July 15, 1916.]

PER CURIAM.—In a petition for rehearing, respondent has offered to remit specific items that were erroneous within our opinion on this appeal; and to this appellant having assented, the cause will not be reversed but will be remanded with instructions to the lower court to enter a judgment in favor of the respondent in the sum of $960.22, as of the date of the original judgment. Costs to the appellant.

[No. 12215. *En Banc.* May 18, 1916.]

ERNEST KUEHL *et al.*, *Respondents*, v. THE CITY OF EDMONDS, *Appellant*.[1]

STATUTES — REENACTMENT — CONSTRUCTION — MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS. The act of 1911 (3 Rem. & Bal. Code, § 7892-1 *et seq.*) relating to local improvements by cities, having carried forward the provisions relating to reassessments, is not to be construed as a new enactment, but as a continuing law from the first amendment in 1893; especially in view of Id., § 7892-70, providing that acts repealed which are reenacted in form or substance shall be construed as continuations or amendments, and saving all proceedings pending under the old law.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—ESTIMATES — REASSESSMENTS — STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7705, limiting the power of assessment of a city of the third class under the old law to an amount equal to the estimated cost, does not limit the power of such city to levy a supplemental or reassessment for the full cost of the work, under the subsequent act of 1911, 3 Rem. & Bal. Code, §§ 7892-42 and 7892-43, which reenacted and carried forward the act of 1893 (2 Rem. & Bal. Code, §§ 7893, 7894, 7895, and 7899), authorizing a reassessment based upon the "actual cost of the improvement at the time of its completion," where the first assessment had failed in whole or in part for any reason, including any "omission, failure or neglect . . . to comply with provisions of the charter or laws . . . as to . . . estimate . . ." etc. (overruling on rehearing, Id., 85 Wash. 307).

[1]Reported in 157 Pac. 850.

JUDGMENT—CONCLUSIVENESS—REASSESSMENTS — MUNICIPAL CORPORATIONS. In the absence of an adjudication of the actual amount of special benefits to specific property assessed, a prior judgment setting aside an assessment as having been in excess of the amount fixed by Rem. & Bal. Code, § 7705, limiting the original assessment by cities of the third class to an amount equal to the estimated cost of the work, is *res judicata* in proceedings to reassess of nothing save the invalidity of the first assessment roll.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS —LIMITATIONS. An attempt to reassess under a prior law the full cost of an improvement, abortive by reason of an insufficient estimate, does not exhaust the power to reassess to pay the actual cost.

SAME—PUBLIC IMPROVEMENTS—REASSESSMENTS—INTEREST. Upon making a reassessment to cover costs that could not be legally included in the original assessment, it is proper to include interest on warrants issued for the improvement, from the date of their issuance to the date when the first assessment for that amount began to bear interest.

CHADWICK and BAUSMAN, JJ., dissent.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 27, 1914, in favor of the plaintiffs, setting aside a reassessment on appeal from the order of the city council confirming the roll. Reversed.

Preston & Thorgrimson and *Turner & Hartge*, for appellant.

Earl W. Husted, for respondent.

H. M. Stephens, *H. W. Hale*, and *J. H. McDaniels*, *amici curiae*.

ON REHEARING.

ELLIS, J.—In 1909, the city of Edmonds, a city of the third class, provided by ordinance for the improvement of Dayton street. An assessment roll was made assessing the property benefited for the full cost of the improvement, amounting to $8,317.33. At the suit of Peabody and others, the superior court enjoined the collection of the assessment for any greater amount than $4,375.75. The city appealed, and in *Peabody v. Edmonds*, 68 Wash. 610, 123 Pac. 1018,

we found that the estimated cost of the improvement was $6,025.75. Following the case of *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768, we held that an assessment only to the extent of that estimate was valid. Shortly thereafter an assessment to that amount was levied. Sometime later, a reassessment, or supplemental assessment, was made under the act of 1911, which in the meantime had been enacted. This included the balance of the principal of the cost of the improvement, amounting to $2,292.33, and interest on all the warrants issued, amounting to $2,161.34, making a total of $4,453.67, which is the amount of the new roll. From this supplemental assessment, certain interested property owners appealed to the superior court. That court held that the council had no power to make a reassessment or supplemental assessment, and further, that our former decision in *Peabody v. Edmonds*, *supra*, was *res judicata* of the amount which could be lawfully assessed against the property. There was no showing that the council acted fraudulently or was in any way guilty of bad faith in the premises. There was no showing that the property in the district was not benefited in the full amount of the original and supplemental assessments, nor that the property of the appellants was assessed in excess of its proportion of the actual benefits conferred by the improvement. The city appealed. That decision was affirmed by Department One of this court in *Kuehl v. Edmonds*, 85 Wash. 307, 148 Pac. 19. A rehearing having been granted, the case was reheard by the court *En Banc*.

On mature reconsideration, we are forced to the conclusion that the Department decision is erroneous, in that throughout it apparently proceeds upon the assumption that, by the act of 1911, the legislature for the first time authorized a reassessment for the actual cost of the improvement up to the full amount of the special benefits to the property assessed, notwithstanding the original assessment had been held void in whole or in part for lack of a sufficient preliminary *esti-*

mate; whereas § 6 of the law of 1893, Laws 1893, p. 229 (2 Rem. & Bal. Code, § 7899), which was in full force when the improvement here in question was made and when the judgment setting aside the first assessment was entered, contained substantially the same provisions as those of §§ 42 and 43 of the act of 1911. As a matter of fact, the body of the law relating to reassessments was not materially changed, but was reenacted by the act of 1911. Compare the statute of 1893, as amended in 1909, Laws 1909, p. 128 (2 Rem. & Bal. Code, §§ 7893, 7894, 7895 and 7899) with §§ 42 and 43 of the statute of 1911, Laws 1911, pp. 468, 469 (3 Rem. & Bal. Code, §§ 7892-42 and 7892-43). The provisions relating to reassessments, being carried forward and reenacted in substance in the statute of 1911, are not to be construed as a new enactment, but as a continuing law from the first enactment in 1893. This is not only true as matter of construction independent of statutory declaration to that effect (*Pierce County ex rel. Maloney v. Spike*, 19 Wash. 652, 54 Pac. 44), but it is so declared in § 70 of the statute of 1911, in express terms as follows:

"Any acts or parts of acts herein repealed, which are reenacted in form or in substance in this act shall not be construed as new enactments but as continuations and amendments of such acts or parts of acts.

"All rights of action under existing laws which this act in any way supersedes or repeals, if the same at the time of taking effect of this act shall not have been commenced, shall proceed under the provisions of this act. All actions and proceedings, which may be pending in court under existing laws which this act in any way supersedes or repeals, shall proceed without being in any manner affected by the passage of this act. All proceedings commenced by any city or town before the taking effect of this act, relating to the making of any local improvement, shall proceed without being in any manner affected by the passage of this act, except as provided in section 7892-24." 3 Rem. & Bal. Code, § 7892-70.

When this section is read in its entirety, the statement in the Department opinion that "the limit of the power under

the act of 1911 is to make all necessary assessments, reassessments or supplemental assessments within the limit of the sum fixed by the law governing the improvement at its inception," loses all point. This is manifest from the simple fact that the law, *at the time of the inception of the improvement*, fixed no limit to the power to reassess other than the actual cost of the improvement apportioned according to special benefits.

It may be objected that the statute of 1893 did not provide for a supplemental assessment. True, it did not *eo nomine*, but it did provide for a reassessment whenever an original assessment had been declared void "in whole or in part," which comes to the same thing. Laws 1893, p. 234, § 3 (2 Rem. & Bal. Code, § 7893).

The Department opinion argues that:

"The basic principle underlying the *Cory* case and our former decision in this case is that, where the legislature has granted a general power or a power with limitation, a city, in the exercise of that power, may so conduct itself as to work an estoppel, and the relative rights of the property owner and the city will be fixed and determined by reference to the law as it existed at the time."

This is true, but the estoppel only extends to the original assessment, since the law *as it existed at that time*, while it required a preliminary estimate of the cost and a hearing thereon pursuant to notice as a prerequisite to a valid *original assessment* (2 Rem. & Bal. Code, § 7705), also declared in § 7899, the section relating to *reassessments*, that:

"The fact that the contract has been let or that such improvement shall have been made and completed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of the charter or laws governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof,

operate to invalidate or in any way effect [affect] the making of the new assessment or reassessment as provided for by this chapter, charging the property benefited with the expense thereof: Provided, that such new assessment shall be for an amount which shall not exceed the actual cost and value of the improvement, together with any interest that shall have lawfully accrued thereon, and that such amount be equitably apportioned upon the property benefited thereby, according to the provisions of the charter or laws of such city or town. It being the true intent and meaning of this chapter to make the cost and expense of all local improvements payable by the real estate benefited by such improvement by making a reassessment therefor, notwithstanding that the proceedings of the common council or board of public works or any of its officers may be found irregular or defective, whether jurisdictional or otherwise; when such reassessment is completed all sums paid on the former attempted assessment shall be credited to the property on account of which the same was paid."

This section was just as much a part of the law as it existed at the time the improvement was made, entering into the transaction and fixing the rights of the parties, as was § 7705 providing for the estimate. It is an unequivocal declaration that the insufficiency of the estimate is no bar to a reassessment to pay for the improvement, "charging the property benefited with the expense thereof" not exceeding "the actual cost and value of the improvement" and interest. That there might be no mistake as to this intention, the section concludes with the emphatic declaration of an intent to authorize such reassessment even when the proceedings of the council or officers "may be found irregular or defective, whether jurisdictional or otherwise." These same provisions, without a material change and almost *in haec verba*, are reenacted in § 43 of the statute of 1911 (3 Rem. & Bal. Code, § 7892-43), under which the reassessment here in question was made.

The Department opinion, still overlooking the identity of § 43 of the act of 1911, so far as material to the point in-

volved, with § 6 of the statute of 1893 (2 Rem. & Bal. Code, § 7899), or failing to note the controlling significance of that fact, says:

"We may assume, as a matter of law and practice in all cases of this kind, that the sum estimated is a fair amount to be allowed for the improvement; that it is the limit of power and is binding upon the city. If it is not so, the legal effect of the statute of 1911 is to permit the council of cities of the third class, where improvements have been made under the former law, to assess the cost without reference to the law under which the improvement was made, and thus destroy the right of the individual property owner to protest or to be heard in remonstrance."

We can assume none of these things on a *reassessment* made by the city in the exercise of the expressly conferred power to reassess for the "actual cost and value of the improvement." To so assume, as a matter of law, would be to ignore the *law* as written and rewritten by the legislature as a continuing law since 1893. To so assume, as a matter of practice, would be to ignore the *fact* that, at the time of the reassessment, the actual cost had been determined by actual construction of the improvement to be greater than the estimate. To assume that the estimate is "the limit of power binding upon the city" in a reassessment would be to strike from the law as it has existed practically unchanged since 1893 the specific declaration as found in § 43 of the statute of 1911:

"Nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of law . . . as to . . . estimate . . . operate to invalidate or in any way affect the making of any assessment authorized in the preceding section," etc. 3 Rem. & Bal. Code, § 7892-43.

The preceding section (Id., § 7892-42), is the section authorizing a reassessment "based upon the actual cost of such improvement at the time of its completion." It would ignore the fact that the statute of 1893, p. 229, § 6 (Rem. & Bal. Code, § 7899) contains the same declaration, as follows:

"Nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of the charter or laws . . . as to . . . estimate . . . operate to invalidate or in any way effect [affect] the making of the new assessment or reassessment as provided for by this chapter," etc.

The same chapter authorizes a new assessment or reassessment for the improvement "based upon the actual value of the same at the time of its completion." (Rem. & Bal. Code, § 7894). It is true that, as to *original assessments* made by cities of the third class under the provisions of §§ 7705 and 7706, which accorded no notice or hearing to the property owner at any time throughout the entire original proceeding before the council except the notice publishing the resolution containing the estimate, we have assumed that the sum estimated was the limit of the power estopping the city to assess for more *in that proceeding*. This for the simple reason that the published notice of hearing on the estimate was in such original assessment proceeding the only hearing accorded to the property owner. *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768; *Chehalis v. Cory*, 64 Wash. 367, 116 Pac. 875; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010; *Peabody v. Edmonds*, 68 Wash. 610, 123 Pac. 1018. In none of those cases were we speaking of anything save the original assessment. That this is the only sound basis of those decisions is pointed out in *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 511, 125 Pac. 970, where, touching the *Cory* case, which is the prototype of the other two, we said:

"A reading of that decision will show, however, that the conclusions there reached by the court were because of the special provisions of the statute relating to local improvement assessments in cities of the third class, Rem. & Bal. Code, §§ 7705, 7706, requiring such estimate to be made, notice thereof to be given to the property owners, and an opportunity for them to protest against the making of the proposed improvement, before it could be finally ordered by the council, and prohibiting the council from ordering such

improvement over the protest of the property owners except upon certain conditions. No other hearing was afforded the property owners before the council as to the making of the improvement nor as to the regularity and correctness of the assessment levied by the council. The only recourse of the property owners under that statute was by an original action in the courts against the assessment, or in resisting the lien of the assessment when it is sought to be foreclosed in the courts."

Obviously the lack of a sufficient estimate and notice of hearing thereon in the *Cory* case, the *Collins* case and the *Peabody* case, is so far from precluding the right of the city to entertain proceedings to reassess in such cases for the actual cost *after giving notice of a hearing upon the one vital question of benefits*, that it furnished the very ground and necessity for such reassessment, under the specific terms of the statute, as then and now existing. This is far also from saying, as said in the Department opinion, that to sustain the reassessment "is to say that the property owners have no rights that cannot be destroyed by the legislature." On the contrary, it is to say that they have the right to a hearing at some time in the course of the proceedings before the council. If that right is not accorded as to the full amount of the cost of the work by reason of an insufficient estimate at the only hearing given in the original proceeding, then the property owner can only be assessed *in that proceeding* his proportion of the estimate distributed according to benefits. In order to charge him with any part of the actual cost of the improvement above the estimate, a reassessment is necessary so that he may not be deprived of his right to a hearing on the one vital question of the proportional benefits to his property. It is because his right to a hearing cannot be destroyed or ignored that a reassessment or supplemental assessment based on notice and a hearing is essential. It was distinctly so declared in *State ex rel. Barber Asphalt Paving Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11, holding not only that the city has the right to reassess, but that the con-

tractor who, in pursuance of a proceeding initiated without notice to the objecting property owners, has constructed the improvement and conferred the benefits can, by mandamus, *compel* a reassessment on the property benefited to pay the cost. There the property owners in an outer zone of sixty feet were reassessed to help pay for an improvement the original notice of the assessment for which did not include their property or advise them that they would be required to bear any part of the cost. The first assessment was held void as to their property because made without notice. The reassessment on the same property for the same improvement, in *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448, was sustained because made with notice and a hearing on the question of benefits. On no sound principle can that case be distinguished from this, either in morals or in law. The following language in the *Johnson* case exactly expresses the situation here:

"The cases brought under the old assessment above referred to are not *res adjudicata*, for the reason that the old assessment is superseded by the reassessment. Those cases had reference to the old assessment, and were *res adjudicata* as to the questions raised therein; but they are not so as to the reassessment, further than a payment under the old assessment becomes by the ordinance a payment *pro tanto* under the reassessment. The assessment is identical with the red figures in the old assessment, and appears to be a fair assessment for benefits received by the property in the district. It is not claimed that the property improved has not received benefits to the amount of the reassessment."

In this respect there is no difference between assessments and reassessments by cities of the first class and cities of a lower grade. In the absence of an adjudication of the actual amount of special benefits to specific property assessed, the prior judgment is *res judicata*, in proceedings to reassess, of nothing save the invalidity of the first assessment roll. *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487; *Waldron*

v. Snohomish, 41 Wash. 566, 83 Pac. 1106; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Inner-Circle Property Co. v. Seattle*, 69 Wash. 508, 125 Pac. 970; *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1016; *State ex rel. Hindley v. Superior Court*, 82 Wash. 37, 143 Pac. 455; 2 Page and Jones, Taxation by Assessment, § 991. There is nothing in §§ 7705 and 7706, under which the original assessment was made, declaring or implying that the original estimate shall be assumed to be the limit of benefits in a proceeding to reassess. On the other hand, as we have seen, the reassessment law, as found both in the act of 1893 and in the act of 1911, makes the failure of the preliminary estimate a specific ground for reassessment. Indeed, the failure or insufficiency of the initial estimate is typical of the cases in which the power to levy a reassessment or supplemental assessment is most frequently invoked.

"Cases of this sort arise most frequently where the original assessment is based upon a preliminary estimate, and is levied before the improvement is completed, or before the cost thereof is determined as a finality. In rarer instances, the exercise of the power is sought where, owing to some mistake, the cost of the improvement has been computed erroneously, and the assessment has been levied for too small an amount to meet the cost of the improvement." 2 Page and Jones, Taxation by Assessment, § 932.

The Department opinion, being based upon a misconception of the law touching reassessments as it existed when the improvement was made, reaches a palpably erroneous conclusion.

But there is another fundamental error in the Department opinion making it unsound, even if the power to reassess for "the actual cost and value of the improvement at the time of its completion" had been first conferred upon the city by the statute of 1911. That error lies in the assumption that the legislature, by requiring a preliminary estimate of the

cost of the work and a notice and hearing thereon in the old law (Rem. & Bal. Code, § 7705), made that estimate a final limitation upon its own inherent constitutional power to authorize, by subsequent enactment, a reassessment or supplemental assessment for the actual cost and value apportioned according to benefits upon the property specially benefited. The limitation imposed by the estimate and notice was a limitation estopping the *city alone, and in that proceeding based on that notice alone,* to assess beyond the amount of the estimate. That was all that was held in the *Cory* case, in the *Collins* case and *Peabody v. Edmonds, supra,* because that was all there was before the court in those cases. That the legislature has the power to authorize a reassessment even where the city council had never acquired any jurisdiction to levy the original assessment or to order the work done, was held by this court in *Frederick v. Seattle, supra,* where it is said:

"The retrospective power of the legislature over subjects of assessments and taxation where past proceedings have proved defective or irregular by reason of the want of power in local boards to act, or by reason of non-compliance with existing provisions of law, is well established by the authorities. One of the leading cases on this question is that of *Mills v. Charleton,* 29 Wis. 400 (9 Am. Rep. 578), where it was decided that the reassessment of a tax under a new grant of authority is not a re-opening of the judgment by which the former assessment was declared invalid and proceedings thereunder restrained; and that it did not conflict with the general rule that a statute which operates to annul or set aside the final judgment of a court of competent jurisdiction and to disturb or defeat vested rights is void; the distinction being that the general rule had reference to matters of mere private right."

See, also, *State ex rel. Hemen v. Ballard,* 16 Wash. 418, 47 Pac. 970. Such is the view generally entertained by the courts. 2 Page and Jones, Taxation by Assessment, § 959.

"The rule applicable to cases of this description is substantially the following: If the thing wanting or which

failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Cooley, Constitutional Limitations (7th ed.), p. 531.

See, also, 4 Dillon, Municipal Corporations (5th ed.), § 1469; *Seattle v. Kelleher*, 195 U. S. 351; *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019.

In every view of the matter, we are convinced that the attempt under the prior law to assess for the full cost of an improvement, abortive, either wholly or in part, by reason of an insufficient estimate, did not exhaust the power expressly conferred by the legislature upon the city to reassess to pay the actual cost of the improvement and interest if within the actual special benefits conferred upon the property assessed.

It has been argued, in substance, that, if the reassessment for the actual cost of the improvement apportioned according to benefits to the property assessed be sustained in this case, the property owner will be robbed of his judgment in the original case and has no rights which the legislature is bound to respect. But the power conferred upon the legislature by the constitution (art. 7, § 9), and exercised by the legislature in the law authorizing such a reassessment, existing now and when the improvement was made, cannot be phrased away in such fashion. If the system of local assessments on the property benefited to pay the actual cost of local improvements is wrong in theory, it is for the people to correct that wrong by amending the constitution, or for the legislature to repeal the laws plainly conferring the power on the city. It is not for the courts, by any process of judicial attrition through strained construction, to seek to wear away the power granted in plain terms. But the property owner is robbed of nothing. His judgment in the first assessment has insured him a hearing on the question

of proportional benefits, which is the only constitutional right he ever had in the premises. If his property has been benefited by the improvement, he is robbed of nothing when that property is assessed to pay its proportional share of the cost within that benefit. The benefits conferred furnish the moral basis, hence the only natural limit to the right of reassessment for the cost of the improvement. *East Hoquiam Co. v. Hoquiam, supra; Seattle v. Kelleher, supra.*

We deem it a matter of no importance that the law governing original assessments, as amended by the act of 1911, now requires no preliminary estimate; a hearing before the council on the question of benefits being now accorded instead of the former hearing on the estimate. But the hearing on benefits in case of a reassessment has always been accorded ever since the passage of the act of 1893. If the new law as to original assessments dispensing with the estimate is valid as furnishing due process of law, then also is the law affording the same hearing on the reassessment. *Johnson v. Seattle, supra.* When the new reassessment law and the old reassessment law are considered together, the one as a substantial reenactment of the other, the question here presented becomes a simple one. We have discussed it thus at length because of the confusion occasioned by some of our own utterances.

Some question is made as to the right to include in the new assessment interest on the first $6,025 of warrants issued for this improvement, from the date of their issuance to the date when the first assessment for that amount began to bear interest. The inclusion of interest in the reassessment was proper. *Philadelphia Mortgage & Trust Co. v. New Whatcom,* 19 Wash. 225, 52 Pac. 1063; *Northwestern and Pacific Hypotheek Bank v. Spokane,* 18 Wash. 456, 51 Pac. 1070; *Lewis v. Seattle,* 28 Wash. 639, 69 Pac. 393; *Johnson v. Seattle, supra.* We can conceive of no reason why the particular item of interest referred to should not fall within the rule.

The Department opinion is overruled, the judgment of the trial court is reversed, and the cause is remanded with direction to confirm the new roll.

MORRIS, C. J., HOLCOMB, MAIN, MOUNT, and PARKER, JJ., concur.

CHADWICK, J. (dissenting)—The contentions of counsel rest primarily on the well settled propositions that, where the original proceeding has failed for reasons that the legislature may lawfully obviate, and the basis for taxation still remains, namely, the public benefit received, the legislature may authorize a reassessment; that the only limitation upon the legislature, and in turn upon the city, is that in no case shall the assessment exceed the benefits accruing to the property from the improvement; that the power to make local improvements under the special assessment plan is referable to the power of taxation, upon which there is no limit until the object sought is obtained; that the courts cannot question the power or authority of the legislature to permit, by remedial or curative act, the performance of any act that will result in the final collection of the tax; that there is no limit to the power to reassess under the act of 1911, which is no more than this and other courts have frequently held to be the law; that the act permits an assessment where "from any cause" the assessment has failed, and that every possible objection is met by a provision that the reassessment shall not be made until after notice by the council to the property owner.

It is not necessary to cite the many cases to be found in our reports which sustain these propositions, nor am I disposed to question the comprehensiveness of the act of 1911. Indeed, it may be logically inferred that it was passed at the instance of the cities and private parties affected by the decisions of this court in *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768; *Id.*, 64 Wash. 367, 116 Pac. 875, and *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010.

But, after a careful consideration of the arguments of counsel, review of the cases cited, and an acknowledgment of the foregoing principles, I am still of the opinion that the act of 1911 does not control in this case.

Our attention is called to the fact that we assumed in the case of *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560, that there was no law prior to the enactment of the act of 1911 which limited the tax upon property to fifty per cent of its assessed value, whereas a similar provision is to be found in the act of 1903; and that many cases of reassessment for a greater sum have been sustained under that statute. It may be true that reassessments have been sustained, but it is also true the point that the limit of power to assess beyond the amount of the estimate was not raised or discussed in any case prior to the *Cory* case, nor does it appear that any such reassessment was made after the amount chargeable to the property had been fixed by final judgment of the courts.

The point made in this case does not occur in any of the cases relied on. The decisions turned upon the propositions that the legislature could grant the power to reassess where the assessment had failed for any cause, and, the limit of the burden to be imposed being defined in the constitution as the extent or amount of benefit, the property owner was without remedy to raise any question other than the question of benefit and the amount of the assessment.

The act under which the improvement was made in this case arbitrarily fixed a limit of benefit. It was apparently passed to cure the loose methods theretofore prevailing, and to give the property owner some notion of the burden to be imposed. It required a notice, not of the amount of the assessment only, but of the proposal or intent to make the improvement. It was so drawn that in its workings it resulted in a compact between the city and the property owner. If the estimate seemed reasonable, the property owner might rest under the legal assurance that his prop-

erty would not be eventually invaded by a proceeding brought under the plea of a right to assess or to reassess without limit up to a sum arbitrarily asserted to be within the limit of actual benefit. The limit of power was in the act; to go beyond it would operate as a constructive fraud upon the property owner, who might be lulled into a sense of security by the carelessness or design of the council, and eventually suffer the confiscation of his property.

The governing principle is so well stated in the *Collins* case that it needs no repetition. It is quoted in the original decision of this case. (*Kuehl v. Edmonds*, 85 Wash. 307, 148 Pac. 19). It is enough to say that the city should be estopped to exceed the estimate in the actual cost of the work. The city, as in the *Cory* and *Collins* cases, had submitted a plan which the property owner either assented to or was bound by after protest. The statute fixed the rights and the relations of the parties. When the city departed from the plan proposed, its acts were challenged.

Taking the case at bar: The city council went in the teeth of the decision in the *Cory* case and, upon the suit of *Peabody v. Edmonds*, 68 Wash. 610, 123 Pac. 1018, it was held that an assessment in excess of the estimate was void. A petition was thereafter filed in which we were asked to tell the city what to do; to define a procedure whereby it could collect the excess from the property owner. This, for obvious reasons, the court refused to do. (*Peabody v. Edmonds*, 72 Wash. 604, 131 Pac. 250.) There was a judicial finding that the statute in force at the time fixed the rights of the parties, and that the city was estopped to charge more than the estimate.

Moving in a fog of its own creation, the majority assumes to correct our former holding that a reassessment after a judgment would deprive the property owner of something of value, a vested right. It is said:

"But the property owner is robbed of nothing. His judgment in the first assessment, has insured him a hearing on

the question of proportional benefits [He had this without his judgment] which is the only constitutional right he ever had in the premises."

The majority has failed utterly to see that the law gave to the property owner more than a mere right to protest the *amount* of his assessment. He was guaranteed the right by statute to *protest against the improvement.* When the city did not keep the faith of the statute, which, as we have often held, is as binding upon a city as is the constitution itself, and the property owner has taken a judgment fixing the limit of the assessment at the limit fixed by the statute, he has been deprived of something of value, a judgment fixing the extent of his liability. That a judgment vests a right that cannot be impaired by a subsequent statute is primer law. 36 Cyc. 1211. It follows that the right to insist upon a proportional assessment is not the only constitutional right the property owner has in this case, although we may grant that, but for the judgment, the argument of the majority is sound.

As shown in our former opinion, the legislature cannot, under the guise of a curative act, grant a right or power resting in jurisdiction that did not exist at the time the right of the taxpayer became fixed. The legislature can cure a defective execution of power or any omission or irregularity, but it cannot take away a right that is vested under an existing statute, or cure an act that was *ultra vires* at the time it was done. The act of 1911 is, in legal effect, no more than an attempted repeal of the limitation fixed by the act of 1903; Laws 1903, p. 231. The assessment in this case did not fail because of any error, defect, or omission in the procedure. It failed *pro tanto* because the city did not have jurisdiction to assess for any sum greater than the estimate.

It was strenuously objected in the *Cory* case, as here, that the estimate was not jurisdictional; that it involved only a question of judgment, and that there was no more than an error of judgment, an irregularity, and so long as the as-

sessment did not exceed the benefit, the property owner has no vested right, and cannot complain so long as the assessment does not pass the limit of benefit. Our holding was that the legislature had fixed the limit of benefit. The right of the legislature to do this is noticed in the *Rucker Brothers v. Everett* case, 66 Wash. 366, 119 Pac. 807, where the court says:

"There is no constitutional limit of this nature to local assessment taxation. Hence, the law-making power could have left the amount entirely without limit of this nature, or could have fixed any limit deemed expedient."

The right to notice of the intention to improve and to protest in such a case is fundamental, as held in the *Cory* case. It is held, without division of opinion, that, where juridical facts are wanting, they cannot be supplied by a subsequent proceeding authorized by a retrospective law. A legislature cannot impair vested rights by a curative act. 2 Lewis' Sutherland, Statutory Construction, 675. A vested right is defined in Black's Law Dictionary as follows:

"Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare."

Where the act would operate to deprive the property owner of the right to protest the improvement when proposed, or to appeal from or review the act of the council—privileges which were given him under the law existing when the improvement was made—and the limit of the assessment has been fixed by a court of competent jurisdiction, whether rightfully or wrongfully, it should not be seriously contended that this right is not vested.

Irrespective of statute, no assessment can be levied in excess of benefit. Let us suppose that there is no constitutional inhibition, and a city should make an improvement that required a tax in excess of benefits, and the legislature passed an act permitting an assessment without reference to benefit, or ten per cent in excess of benefits. Such an act would be admittedly void. The same principle applies here. It was within the province of the legislature to fix the limit of benefit, and, having done so and the proceeding being regular and having passed to judgment, it cannot, by a subsequent act, repeal that limit, fix a greater limit, or say that the limit is the actual benefit received.

We have said heretofore that the statute under which the assessment was made fixes the rights and obligations of the parties. The right of the city is to assess a sum equal to the estimated cost, and the duty of the property owner is to pay within that limit. Neither party could claim a vested right in the remedy, applying to either the right or the obligation. Curative acts presuppose jurisdiction to do the thing which is attempted to be cured. They cure irregularities in exercising a power lawfully possessed; beyond this they are never sustained. *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672.

In Page and Jones, Taxation by Assessment, § 981, the rule is stated: "If an estimate is a jurisdictional fact, these curative statutes do not apply where no estimate has been made." By the same reasoning, it would seem, where an estimate is made under a valid statute and the improvement is made in defiance of it, that a curative act would not apply. In *Erie v. Brady*, 150 Pa. St. 462, 24 Atl. 641, the law required an estimate of the probable cost of the improvement. No estimate was made. The assessment was held void. The passage of an act repealing the requirement of an estimate was obtained. (The act of 1911 is no more nor less than a repealing statute.) Upon suit brought, the court held that

the curative act did not validate the proceeding. See, also, *Erie City v. Brady*, 127 Pa. St. 169, 17 Atl. 885.

Mr. Lewis, in his work on Sutherland, Statutory Construction, § 284, says:

"A contractor for grading streets was authorized by the existing law to sue delinquent abutters for unpaid assessments. This right of action was held a part of the contract and not taken away by repeal of the law creating it."

citing *Creighton v. Pragg*, 21 Cal. 115. The rule of the case is stated in the syllabus:

"Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made."

It would seem, if the right of the creditor in the transaction is fixed by the existing law and cannot be diminished by a subsequent law, that the liability of the property owner could not be enlarged by like methods.

In *Matter of Second Avenue M. E. Church*, 66 N. Y. 395, the legislature had, by general law, provided that property should not be assessed for a sum exceeding one-half the value of the property as valued by the assessing officers. A greater assessment was made under a subsequent act providing that no assessment should be vacated for an omission in the performance of any official duty or in carrying out the details of a law or ordinance, or for any irregularity. It was held that the act was not retroactive. The court, in passing, touches the very point in issue here:

"A proviso in a grant or enactment, is something taken back from the power first declared. The grant or enactment is to be read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bounds of the proviso."

And in discussing the curative act, the court says:

"The matter alleged by the appellant is not an irregularity, it is lack of fundamental power; it is not an omission to carry out the detail of a law, it is the total want of authorizing law; it is not a defect in the authority to perform a duty imposed, which supposes an official obligation without power adequate, but it is a case of no power given because no duty is imposed; it is not an omission to perform a duty imposed, but a case where, as last said, there is no duty created."

The words "or for any cause," in the act of 1911, must be held to mean any cause within the constitutional limit of legislation.

In *Mayor etc. of Baltimore v. Horn*, 26 Md. 194, there had been, as here, a previous adjudication of the invalidity of the proceeding. It was settled by the judgment of the court that the mayor and council had exceeded their powers. In this dilemma, the city authorities adopted measures for, and did procure curative acts of the legislature which authorized them to pay for the improvement and to collect the costs thereof as a tax against the property. In passing on the right of the property owner as it had been fixed by the previous judgment of the court, and of the power of the legislature to pass a curative act after judgment, the court said:

"The most prominent objection to this law, taken in the argument by the counsel of the appellees, was that the legislature in passing it, exercised judicial power, which, by the Declaration of Rights, and numerous decisions in this state and other states of the Union, which separate the judicial from the legislative and executive powers of government, it could not assume and exercise. And this position, we think, is well taken. When this law was passed, the rights of the parties under the law of 1856, ch. 164, had been judicially determined by this court. In the case of *Porter v. The Mayor & City Council*, this court had adjudged that the parties assessed in certain proceedings under that law, were not liable for the assessments, and had perpetually enjoined the city authorities from proceeding to collect them; and yet the law of 1864, ch. 344, passed after that decision, expressly authorized those authorities to proceed and collect them. It

adjudged those parties to pay that which this court, in a regular proceeding, determined they were not bound to pay. It, in effect, and that most plainly, reversed the judgment of this court. That which this court said was illegally done, or done without authority of law, or in contravention of law, and that the parties could not be assessed for, this act of assembly clearly declares shall be paid for by the parties, although they were relieved from that payment by the final determination of this court. There certainly could not be a more plain assumption of judicial power by the legislature, than was exercised by the enactment of the law of 1864, ch. 344, and as such, this law must be pronounced inoperative and void. It is unnecessary to repeat the reasons and grounds which have guided the courts in adjudications of this kind."

Other cases which seem to me to be in point are cited in the original opinion of this court.

Mr. Gray, in his work on Limitations of Taxing Power and Public Indebtedness, questions the broad rule which rests on jurisdiction, but, nevertheless, finds satisfactory ground upon which to rest the judgments of the courts holding that a legislature cannot, by a repeal of an existing law or a curative act, take away a right vested under an existing law. He says in § 1252a:

"If the general rule be granted that the legislature can validate omissions which it might have authorized in the first instance, there can be no escape from the conclusion that it can validate even the most important omissions in statutory procedure. The truth seems to be that there are certain requirements, customarily inserted in statutes, which the citizen has a right to rely on; that these more important requirements approach almost to the dignity of constitutional rights; that where the citizen has relied on them a kind of estoppel, to speak very loosely, is raised against the state; and that in such cases the rule that the legislature may validate the omission of acts which it might have dispensed with in the first instance is limited by the greater rule that legislative acts which amount to plain and flagrant injustice amount to a taking of property without due process of law,

by whatever theory the taking is sought to be justified. Acts of this class are conceived to be acts which are made by statute to be conditions precedent, by performance of which the administrative officers acquire authority to act at all; and which are links in the chain of procedure by which the citizen may be deprived of his property."

So that, whether we call the governing principle juristic, as we did in the *Cory* case, or one of estoppel, as we did in the *Collins* case, the opinions are sustained in sound reason, and I am not disposed to sanction an overruling of them by a legislative enactment.

It would seem that we did not comprehend the law when writing our former opinions; that we have been the victims of what is now called "judicial attrition." I do not know what that may be, but I do know that the decisions of courts were first reported in the year 1066, and from that time until this court found a way to say that its former adjudications upon the subject-matter of the present controversy mean nothing, it has been understood that a final judgment meant something to the one who had prevailed in an action at law or a suit in equity. The majority has, however, with a gravity that would be ludicrous if it were not for the disastrous consequences to the property owner, held, for the first time in the history of jurisprudence, that a judgment of the supreme court of this great state is a liability instead of an asset.

This decision puts us in a most unenviable position. While the court may be applauded for its dialectics, it would seem that we should, in simple honesty, have said to Cory, and to Collins, and to Peabody, and to Kuehl that their fight was a futile thing, that they had no right that could not be taken away from them by another and an independent proceeding; that a judgment of this court would not evidence their legal rights, but rather their folly in appealing to the courts; that, while technically they were right, it would be for their best interests to hold against them so as to save them the added

costs of a subsequent proceeding which the judgment of the court would not bar.

It should not be understood that I hold that a city cannot make a reassessment where the original assessment has failed for any cause. What I do insist is the law, is that, where a limitation is willfully ignored, and the citizen challenges the proceeding—where the parties clinch and go to the mat—the judgment is a final adjudication of their rights, whether right or wrong.

This decision may satisfy the frigid heart of reason, but it withers the tender soul of conscience. It will encourage those who, in these times of shifting sentiment, say that some courts never make a precedent and never follow one. It will invite appeals, for surely no lawyer will feel safe in advising his client that the law has been settled by a former decision of the court, or that a judgment once entered is final.

The intent of the law, under which the several cases now discredited were decided, was to prevent a careless administration in assessments for public improvements that had well nigh become a scandal and an outrage upon the rights of the property owner.

Notwithstanding the letter, spirit, and intent of the law, the court has held that the limitation means nothing, and that, although the rights of the parties have been settled by a judgment, the city council can, in an independent proceeding, assess at will to cure their excesses, and that the citizen must bear a burden which, if disclosed in the beginning, would have led to such protest as to defeat the whole scheme.

The council could lawfully proceed only under a fixed limitation. My position can be illustrated by resort to an analogy. The law provides that actions upon written contracts shall be begun within six years. Let us suppose that an action had been begun, and this court had held that it could not be maintained because it had not been begun within the

time limited. Then say that the legislature had passed a law that all actions upon written contracts that had been defeated "or failed from any cause" might be begun anew and prosecuted to judgment. I had thought that no court on earth would hold that it could be done, but since the legislature has an unquestioned power to fix a limitation in the first place, and a judgment is no longer a vested right, I imagine the court would, if consistent, hold that the new action could be maintained.

Time and space will not permit a further discussion. I said in one case, *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820,

"An owner of private property in a city has few rights that the city is bound to respect, but the rights which the constitution gives him are his, and until the people modify their will, no city can take them away."

I claim the privilege of withdrawing that statement, and in lieu thereof, saying that the citizen has no rights that a city council is bound to respect—that is, to say, such is the *present* state of the law.

BAUSMAN, J., concurs with CHADWICK, J.

[No. 13065. *En Banc.* May 13, 1916.]

WERNER EGGERTH *et al.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*.[1]

JUDGMENT—CONCLUSIVENESS—ASSESSMENTS—MUNICIPAL CORPORATIONS—REASSESSMENTS — LIMIT — ENLARGED DISTRICT. A judgment upon appeal from a city council, reducing an assessment for a local improvement to fifty per cent of the assessed value of the property in the district, as limited by 3 Rem. & Bal. Code, § 7892-12, is not *res judicata* of the right to reassess the property in excess of the reduced amounts, in proceedings therefor including the property, in an enlarged district, in which the unit for determining the fifty per cent limit is the entire enlarged assessment district, and not the particular lots or tracts composing the district; as the reassessment is an assessment *de novo* in all things; especially in view of 3 Rem. & Bal. Code, § 7892-14 expressly authorizing an enlarged district for a reassessment; and Id., § 7892-43, declaring that the reassessment may include property not in the original assessment district.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS—PROCEDURE—STATUTES. A reassessment under 3 Rem. & Bal. Code, § 7892-43 is an independent proceeding which may be made without reference to Id., §§ 7892-13 and 7892-14 relating to the initiation of the improvement, which have no application to reassessments, this being the necessary implication from Id., § 7892-44 specifying in what particulars the law governing original assessments shall apply to reassessments.

SAME—REASSESSMENTS—VALIDITY. Any reassessment based on notice and a hearing is valid where in its aggregate it does not exceed the actual cost of the improvement and interest, less any sum paid under a former assessment, and it is equitably distributed upon all property specially benefited by the improvement in proportion to such benefits.

SAME — REASSESSMENTS — REBATES — NONOBJECTING OWNERS — WAIVER OF RIGHTS. In making a reassessment, upon reducing the amounts charged against objecting owners, no levy can be made for the purpose of rebating to nonobjecting owners whose original assessments were left unchanged; since by not objecting they confessed the original assessments, and there is no authority for such rebates.

SAME—REASSESSMENT—REVIEW—DECISION. The inclusion of an unlawful rebate in a reassessment does not necessitate a new assessment, as a horizontal reduction is a mere matter of calculation.

[1]Reported in 157 Pac. 859.

COSTS—ON APPEAL FROM ASSESSMENT—TRANSCRIPT—STATUTES. 3 Rem. & Bal. Code, § 7892-22, authorizing costs for a transcript furnished by a city clerk on appeal from an assessment roll, does not permit the allowance of costs for a transcript furnished by a party.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 19, 1915, upon findings in favor of the plaintiffs, setting aside a reassessment on appeal from the order of the city council confirming the roll. Reversed.

H. M. Stephens, Ernest E. Sargeant, and *Dale D. Drain*, for appellant.

Skuse & Morrill, Clyde H. Belknap, A. G. Starkey, Graves, Kizer & Graves, and *Hamblen & Gilbert*, for respondents.

ELLIS, J.—This is an appeal from a judgment annulling a reassessment roll upon the Northwest Boulevard improvement, in the city of Spokane. The original assessment roll was annulled by the superior court because it exceeds fifty per cent of the assessed valuation of the property within the district, exclusive of improvements. The second roll, being the first reassessment roll, was laid upon the same district for the full cost of the improvement, expenses and interest. On objection of the owners of much of the property in the district, that roll was reduced by the trial court to a little less than twenty-two per cent of the assessments as to objecting property owners, on the ground that such was the limit which could be imposed under § 12 of the act of 1911 (Laws 1911, p. 445, § 12; 3 Rem. & Bal. Code, § 7892-12), limiting assessments to fifty per cent of the assessed valuation of the property in the district, exclusive of improvements. That judgment was affirmed by this court in *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560. Thereafter a mandamus proceeding was brought to require cancellation of the original roll, and reduction of the second roll in accordance with the former judgment. The writ was granted, and that judgment was also affirmed by this court.

State ex rel. Hindley v. Superior Court, 82 Wash. 37, 143 Pac. 455. The second reassessment roll was then prepared covering a large amount of territory which the reassessment ordinance declared to be benefited by the improvement and which was not included in the preceding rolls. The assessed valuation of all the property in the new district is $727,818. The amount of assessments remaining on the first reassessment roll and the amount laid by the second reassessment roll aggregate $188,600.28. The amount of the cost of the improvement, with expenses and interest to July 1, 1915, the date as of which the second reassessment was made, was $154,712.43. The excess of approximately $34,000 of the assessment over this cost was levied in order to refund to nonobjecting property owners on the first reassessment roll the amounts in which the assessments on their properties exceed the assessments laid by the second reassessment roll on properties similarly situated. On appeal from the order of the council confirming this second reassessment roll, the superior court found all of the foregoing facts, and also:

"That the evidence is not sufficient to warrant the court in setting aside any assessment for lack of benefit. That the evidence does not show that the property is not benefited to the extent of the assessment made in accordance with the second reassessment roll before the court in this action."

It concluded as a matter of law that:

"The court refuses to set aside the assessment on account of lack of benefits, but does hold that the assessments should be cancelled because made on a fundamentally wrong basis, that is, on the basis of making refunds to the nonobjecting property owners on the first reassessment roll."

Judgment went accordingly, and the city has appealed.

As sustaining the annullment of this second reassessment roll, the respondents assert that the judgment reducing the first reassessment, as affirmed by this court, is *res judicata* of the right to assess their properties in excess of the amounts to which their assessments were reduced by that judgment.

In *Van Der Creek v. Spokane*, *supra*, touching the provision in the judgment of the trial court attempting to limit the amount of the assessment in case of a second reassessment to 21.632 per cent of the first reassessment against each specific property, we said:

"The city also complains that the superior court could not fix the amount that might be lawfully assessed against respondents' property. The factors in the equation are fixed, and appellant is not prejudiced by the order of the court; for, in reassessing, it could not, under the law, go beyond the figures fixed by the court in any event."

It is upon this language that the claim of *res judicata* is based. But it is clear that neither the trial court nor this court had the power to control in advance the action of the council in making the reassessment. Any attempt to do so was beyond the issues and void on its face. *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754. The power to reassess is conferred by statute passed pursuant to the express terms of the constitution (art. 7, § 9) and can only be measured or controlled by the statute. That the above quoted language was used inadvertently and was not intended to control the future action of the council is shown by the earlier statement in the opinion that:

"A reassessment is permitted under §§ 42 and 43 of the Laws of 1911, pp. 468, 469 (3 Rem. & Bal. Code, §§ 7892-42, 7892-43). We shall not set them forth in this opinion, for a most casual perusal will show that the statute contemplates an assessment *de novo*."

Again, in the last paragraph, we said:

"We are asked to decide that the council may enlarge the assessment district as heretofore defined, in order to bring in enough territory to pay the cost of the improvement. This we have no power or authority to do. If others are brought in, they are entitled to their day in court."

This is a definite disclaimer of the power or authority to control the action of the council in advance. Obviously, since

we cannot control in advance the limits of the new district, we cannot determine in advance the assessed valuation for general taxes of the property in such new district, hence cannot limit in advance the amount of the reassessment against the property therein with reference to that valuation otherwise than as limited by that valuation itself. But this question of *res judicata* is no longer an open one. In *State ex rel. Hindley v. Superior Court, supra*, speaking of this very matter, we said that the proposition is founded in reason that the city "should not be hampered or embarrassed" by the judgment of the superior court which sought to limit the amount which certain property might be assessed in case of a reassessment. The clear import of that decision is that when the second reassessment comes before the council, it shall be treated as an assessment *de novo* in all things. See, also, our recent decision so holding in the rehearing in *Kuehl v. Edmonds, ante* p. 195, 157 Pac. 850, and the numerous decisions of this court therein cited.

The language of the *Van Der Creek* case, upon which respondents rely, is inaccurate. The "factors of the equation" were not "fixed" by the proceeding on the first reassessment, except in that proceeding and as to the district as then constituted. The factors in the new and enlarged district now before us are different. Section 12 of the statute of 1911 (3 Rem. & Bal. Code, § 7892-12), relating to local improvements, provides that, in cities of the first class, the property within the local improvement district shall not be assessed in excess of fifty per cent of the assessed valuation for general taxation of the property within that district, exclusive of improvements, unless petitioned for as therein provided. In construing cognate charter provisions and the earlier statute of 1903 (2 Rem. & Bal. Code, § 7571), of like import, we have held uniformly that the unit for determining the fifty per cent limit is the entire assessment district and not the particular lots or tracts composing the dis-

trict. These may still be assessed to the limit of their proportional benefits, provided the aggregate shall not exceed fifty per cent of the assessed valuation of the whole district. *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *State ex rel. Hindley v. Superior Court*, *supra*. The assessed valuation for general taxation of all the property in the old district was $58,493. The assessed valuation for general taxation of all the property in the new district is $727,818. The factor fixing the limit beyond which the total assessments cannot go is fifty per cent of the assessed value of all the property in the district. Obviously, this factor changed when the district was changed. There is in the statute neither provision nor implication that the enlargement of the unit, the district, shall not enlarge the limit of the assessment. The necessary implication is just the contrary.

But the respondents argue that the limits of the first district being defined by § 13 of the act of 1911, and the total valuation of the property in that district being only $58,493, the limit of the power not only to assess, but to reassess, is fifty per cent of that valuation, or $29,246. This conclusion is based upon the assertion that the power of the city to reassess is dependent upon the fact as to whether or not it had the power to order the improvement and make the assessment in the first instance. This, of course, thus broadly stated, is not the law and never was. The legislature can authorize a reassessment even where the work was ordered and done without any initial jurisdiction or power in the city. *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364.

But even assuming counsel's postulate to be the law, the argument fails for the simple reason that the city council had the power by § 14 of the same statute of 1911 (3 Rem. & Bal. Code, § 7892-14), to have made an enlarged original district instead of that provided for in § 13, so as to include within the district property the assessed valuation of which

would have sustained an assessment sufficient to pay the actual cost of the improvement, provided only, that it found, as it did find in the second reassessment, that the property in such enlarged district was specially benefited by the improvement to the extent of such cost. Moreover, the power to make an enlarged district for reassessment or supplemental assessment is conferred in express terms in § 42 of the statute (3 Rem. & Bal. Code, § 7892-42). It declares:

"Any city or town is hereby authorized to assess or reassess all property which the council shall find to be specially benefited to pay the whole or any portion of the cost and expense of any local improvements which such city or town has heretofore made, is now making, or may hereafter make at the expense in whole or in part of property specially benefited thereby, whether or not such property so to be assessed or reassessed abuts upon, is adjacent to, or proximate to such improvement, or was included in the original assessment district; and the right to so assess all property so found to be specially benefited shall also apply to any supplemental assessment or reassessment which such city or town may find it necessary to make for the purpose of providing for any deficiency in any local improvement district fund caused by the invalidity of any portion of the original assessment in such improvement district, or where for any cause the amount originally assessed shall not be sufficient to pay the cost of the improvement."

The next section, 3 Rem. & Bal. Code, § 7892-43, also declares that the reassessment roll "may include any property specially benefited by such improvement, whether or not the same was included in the original assessment district," and that the authorization to reassess shall extend to all cases where an assessment has failed because of any failure to comply with "the provisions of law" in the making of original assessments, "whether jurisdictional or otherwise." The reassessment is a proceeding *de novo*. There can be no question of the council's power to enlarge the district for the purpose of reassessment. It follows that the unit for

the determination of the fifty per cent limit of the assessed valuation is the district so formed.

It is further argued that, because the initial ordinance declared, as directed by the statute (§ 13), that the original district included all the property to be specially benefited, therefore there can be no enlarged district including other property. The argument is specious. The question of benefits is always a question of fact. The finding of benefits, as made in the original ordinance, was only *prima facie* and tentative. That is why the statute accords to the property owner a hearing on the question of benefits before any assessment roll is confirmed. The fact that, by reason of the enlarged district, the council was enabled to assess the respondents' properties in a greater amount than they could have been assessed in the original district is a matter of which they cannot complain, so long as their present assessments do not exceed the special benefits to their properties equitably apportioned with reference to the other properties in the district. Sections 13 and 14 (3 Rem. & Bal. Code, §§ 7892-13, 7892-14) relate to the *initiation of the improvement*. They show on their face that they were never intended to apply to reassessments or supplemental assessments to pay for improvements already made. Section 42 (Id., § 7892-42) authorizes the city to make reassessments and to "enforce their collection in accordance with the provisions of law and ordinance existing at the time the reassessment is made." But it does not provide that the reassessment shall be *either initiated or made* in accordance with the law relating to original assessments. On the contrary, § 43 presents an independent procedure for initiating and making the reassessment. It says:

"The city council of any city or town shall proceed with any assessment authorized in the preceding section by passing an ordinance ordering the same, and directing the preparation of an assessment-roll therefor, which roll may include any property specially benefited by such improvement,

whether or not the same was included in the original assessment district. Such additional property when so assessed shall become a part of the local improvement district theretofore created, or attempted to be created, to provide a fund to pay for said improvement, and all payments of assessments so ordered shall be paid into and become a part of the local improvement fund provided to pay for said improvement." 3 Rem. & Bal. Code, § 7892-43.

The next section, 3 Rem. & Bal. Code, § 7892-44, specifies in what particulars the law governing original assessments shall apply to reassessments. It omits any mention of the formation of the district or of the distribution of the assessments. The necessary implication is that these are governed by §§ 7892-42 and 7892-43, which purport to cover them. The inherent vice of the respondents' entire argument lies in its persistent confusion of the two proceedings.

The sole criteria of the validity of a reassessment or supplemental assessment roll (aside from the limitation to fifty per cent of the assessed valuation for taxation of the property in the new district), are that its aggregate shall not exceed the actual costs and expenses of the improvement and the accrued interest thereon, less any sums paid under any former assessment, and that it shall be equitably distributed upon all the property specially benefited by the improvement in proportion to such benefits. Any reassessment or supplemental assessment attaining these results, based on notice and a hearing, is valid. Such is the clear import of §§ 7892-42 and 7892-43 of the statute of 1911.

The trial court found, as we have seen, that the evidence was not sufficient to warrant the court in setting aside any of the assessments for lack of benefits. A careful examination of the evidence convinces us that this finding should be sustained. We are convinced that none of the objections made before the trial court and urged here were sufficient to warrant the court in annulling the second reassessment roll. We are, however, equally convinced that the roll should have been modified. We find no warrant in the statute for levying,

by means of the reassessment roll, any sum for the purpose of rebating property of nonobjecting owners whose assessments were left unchanged on the first reassessment roll. By not objecting to that roll, they tacitly confessed themselves content with the amounts assessed against them. However equitable this contemplated rebate may be, neither the council nor the courts have any power to make an assessment for that purpose. We find, therefore, that the assessments on the properties of the respondents here should be horizontally reduced in their proportion of the amount so assessed against the reassessment district to pay these rebates. There is no necessity for setting aside the second reassessment roll to accomplish this purpose. It is merely a matter of computation.

It is not clear in the record whether the assessments of the respondents here, as laid by the second reassessment roll, include the amounts allowed to stand against them by the judgment reducing the first reassessments as to their properties. The court found that the amount of the assessments remaining on the first reassessment roll against nonobjecting property is $76,759.55, exclusive of accrued interest, and that there remains on the abutting property on the second reassessment roll $12,641.95, which was levied and allowed to stand under the first reassessment. If, on transmission of the remittitur in this case, the trial court shall find that the amounts assessed against the properties of these respondents and allowed to stand on the first reassessment roll are included in their assessments on this second reassessment roll, then it is clear such assessments on the second reassessment roll should be correspondingly reduced.

The appellant city has excepted to the cost bill of the respondents as filed and allowed by the lower court, in that it includes $341.40 for the transcript on the appeal from the council to that court. It is conceded that no part of this, save $9.10, was paid to the city clerk. The respondents prepared their own transcript. It is the settled law of this

state that "costs are purely statutory, and can only be awarded when the statute gives them." *Meade v. French*, 4 Wash. 11, 29 Pac. 833; *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661; *Pierce County v. Magnuson*, 70 Wash. 639, 127 Pac. 302, Ann. Cas. 1914 B. 889; *Creighton v. Cole*, 10 Wash. 472, 38 Pac. 1007. Here the governing provision is found in § 22 of the act of 1911, 3 Rem. & Bal. Code, § 7892-22. It provides for the filing of a transcript:

"Which transcript, upon payment of the necessary fees therefor, shall be furnished by such city or town clerk and by him certified to contain full, true and correct copies of all matters and proceedings required to be included in such transcript. Such fees shall be the same as the fees payable to the county clerk for the preparation and certification of transcripts on appeal to the supreme court in civil actions."

We have repeatedly held that a party who prepares his own transcript on appeal to this court cannot recover costs for the same. *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 901. The analogy is complete. This item of the cost bill should be reduced to $9.10.

The judgment is reversed, and the roll is remanded for modification and confirmation in accordance with this opinion.

MORRIS, C. J., MOUNT, MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 12832. *En Banc.* May 13, 1916.]

C. L. COLLINS *et al.*, *Appellants*, v. THE CITY OF ELLENSBURG, *Respondent*.[1]

APPEAL—REVIEW — INVITED ERROR — ASSESSMENTS. Upon appeal from a judgment confirming a reassessment, error cannot be predicated upon the adoption of the zone system, where that was done at the instance of the appellants.

MUNICIPAL CORPORATIONS—REASSESSMENTS — INTEREST AND COSTS —REAPPORTIONMENT. Upon levying a reassessment to make up a reduction in the original assessment allowed to objecting owners, those who paid up their original assessments in full cannot be assessed to make up accumulated interest and the cost of the reassessment necessitated by the nonpayment of the objecting owners.

Appeal from a judgment of the superior court for Kittitas county, Grady, J., entered January 30, 1915, confirming an assessment roll for a public improvement, on appeal from an order of the city council. Affirmed.

A. L. Slemmons and *G. P. Short*, for appellants.

H. W. Hale (*John H. McDaniels*, of counsel), for respondent.

ELLIS, J.—In the year 1909, Ellensburg, a city of the third class, provided for the laying of a sewer in the alleys through certain blocks, and for payment of the cost by special assessment on the property benefited. In the initial ordinance, it was estimated that the improvement would cost $6,000. In June, 1910, after the work was completed, it was ascertained that the actual cost was $11,147.04. A part of the difference between the preliminary estimate and the actual cost is accounted for by the fact that the sewer was extended through block seven, which was not included in the district as outlined in the initial ordinance. When the work was completed, the city levied an assessment against all the property within the district, including also block seven, which

[1]Reported in 157 Pac. 864.

assessment was based on the actual cost of the work apportioned according to the respective values of the various lots and tracts as shown upon the general assessment roll for city purposes for the year 1909, as authorized by § 3 of ch. 60 of the Laws of 1909, p. 106 (2 Rem. & Bal. Code, § 7714). All of the property owners in block seven paid their original assessment in full without protest. No question concerning that property is now involved. The only notice of the original assessment was the notice conveyed by the publication of the initial ordinance containing the insufficient estimate. Most of the property owners waived the objection of want of notice of the increase of the assessment over the estimate and paid their assessments in full. The present contestants, however, and certain others not now appealing, brought suit to restrain the enforcement of the assessments against their properties. That action finally reached this court on appeal, and on the authority of *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768, we held the original assessment against the appellants' properties void as to any sums in excess of their proportion of the original estimate. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010. The superior court, on the return of the remittitur in that case, reduced the assessments against the appellants' properties to their proportion of the $6,000, and enjoined the city from enforcing the original assessments in any greater sums against those properties, but without prejudice to the city's right to reassess upon notice.

The reduction of the original assessments against appellants' properties resulted in a deficit in the local improvement fund, which, with interest at the time of the reassessment, it is stipulated amounts to $3,367, for which sum the present reassessment was made. In the new roll, the amount of the deficit, including interest, was reassessed against the properties of those only who had not paid their original assessments in full. The reassessment was apportioned upon the same basis as the original assessment, that is, in propor-

tion to the values as indicated by the general assessment for the year 1909. On the hearing upon the reassessment roll pursuant to notice, the appellants appeared before the council and objected upon various grounds, one of which was that the assessment should have been made upon the zone basis as provided by the act of 1911, which in the meantime had been passed. The council confirmed the roll as made. The contestants appealed to the superior court. That court recognized the right of the city to reassess the properties actually reassessed to the extent of the actual cost of the improvement with interest, but held with the appellants that, as among the lots and tracts so reassessed, the reassessment should be apportioned on the zone basis, as prescribed by § 13 of ch. 98, Laws of 1911, p. 446 (3 Rem. & Bal. Code, § 7892-13). All persons in the district affected by that modification were brought in by summons, but none of them appeared or objected to the modification as proposed. On January 30, 1915, the court confirmed the reassessment roll so modified. Collins and others, being original appellants to the superior court, have appealed to this court.

The main contention is that the judgment in the original case of *Collins v. Ellensburg*, entered pursuant to our prior decision, is *res judicata*, precluding the city from reassessing for any sum. This question has been disposed of by our decision on the rehearing in the case of *Kuehl v. Edmonds*, *ante* p. 195, 157 Pac. 850, in which the power of the city to reassess for the deficiency in such a case is recognized.

Some question is suggested as to the propriety of the superior court's modification of the reassessment roll to make it conform to the zone system. But the question is not before us. The city has not appealed, and the appellants cannot raise the question, since the change of the roll from the basis of value to the zone basis was made at their instance.

The appellants assert that so much of the reassessment or supplemental assessment as represents accumulated interest should be laid over the whole district, including the lands of

those who paid their original assessments in full. This position is untenable. Those who paid the original assessment without contest, it must be presumed, did so in order to avoid the accumulation of interest and the cost of a reassessment. It would be manifestly inequitable now to impose upon them, or any of them, any part of this interest and costs for the accruing of which they are in no sense responsible.

It is not claimed that the council in levying the reassessment was guilty of any fraud or bad faith. There is no evidence that the properties assessed are not benefited to the full amount of the respective assessments.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MAIN, MOUNT, and PARKER, JJ., concur.

[No. 12702. Department Two. May 13, 1916.]

GRACE M. NICHOLS *et al.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS—SUBSEQUENT STATUTES. As the legislature may authorize a reassessment even where the work was ordered done without any initial jurisdiction or power in the city, a reassessment may be made under an act passed subsequent to the making of the improvement and the original assessment roll.

SAME—REASSESSMENT—APPORTIONMENT—STATUTES. A reassessment being a proceeding *de novo* in which the council may enlarge the district, a reassessment upon an enlarged district need not be made in accordance with the five-zone system, as required of original assessments by 3 Rem. & Bal. Code, § 7892-13; there being no such statutory requirement for reassessments.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 5, 1915, setting aside reassessment rolls for public improvements, on appeal

[1]Reported in 157 Pac. 863.

from an order of the city council confirming the rolls. Reversed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and *Dale D. Drain,* for appellant.

F. W. Girand, Robertson & Miller, and *Skuse & Morrill,* for respondents.

MAIN, J.—This is an appeal by the city of Spokane from five judgments of the superior court for Spokane county, annulling and setting aside certain reassessment rolls for local improvements. After notices of appeal had been served, it was stipulated by the parties that the five cases should be consolidated and considered as one upon appeal.

The original assessment was attempted to be made under the provisions of the city charter of the city of Spokane as it then existed. It was composed of three zones. Each of the zones comprised one-third of the distance back from the marginal lines of the improvement to the rear limits of the assessment district. According to the original roll, each of these zones bore a certain percentage of the cost. In *Cook v. Spokane,* 69 Wash. 526, 125 Pac. 776, the original roll was held invalid as to the second and third zones. In other words, the assessment was held invalid because the city charter of the city of Spokane did not permit an assessment outside of the one hundred and fifty foot limits from the marginal lines of the improvement.

The local improvement code, Laws of 1911, ch. 98, p. 441 (3 Rem. & Bal. Code, § 7892-1), was passed by the legislature subsequent to the time when the original assessment roll was made. The reassessment in question was made under the provisions of that code. The original assessment for the first zone, or covering the first one hundred and fifty feet from the marginal lines of the improvement, having been sustained in *Cook v. Spokane, supra,* in the reassessment the inner boundaries were fixed at one hundred and fifty feet from the marginal lines of the improvement, or the outer lines of

the original improvement so far as it was held to be valid. In the reassessment roll was included the property as to which the original assessment roll had been held invalid. From the facts stated, it thus appears that, at the time the original assessment was made, there was no law authorizing an assessment of the property covered in the reassessment roll.

The first question is whether, there being no law authorizing the assessment of this property at the time the original assessment was made, it can be reassessed under a law subsequently passed. Upon this question the rule is that the legislature can authorize a reassessment even where the work was ordered and done without any initial jurisdiction or power in the city. *Kuehl v. Edmonds, ante* p. 195, 157 Pac. 850; *Eggerth v. Spokane, ante* p. 221, 157 Pac. 859. In the case last cited, it was said:

"The legislature can authorize a reassessment even where the work was ordered and done without any initial jurisdiction or power in the city."

The two cases cited have been only recently decided by this court, and the question is there fully discussed. Upon the authority of those cases, it must be held that the city had the power in the present case to make the reassessment under the provisions of the local improvement code, which was passed subsequent to the time when the improvement was made and the original assessment roll prepared.

It is next claimed that the reassessment is invalid because not laid in accordance with the five-zone system, as provided in §§ 13 and 14 of the local improvement code. Laws 1911, pp. 446, 448 (3 Rem. & Bal. Code, §§ 7892-13, 7892-14). The provisions of the code which cover the matter of reassessment are found in Laws 1911, pp. 468, 469, 471, §§ 42, 43, and 44 (3 Rem. & Bal. Code, §§ 7892-42, 7892-43, 7892-44). Under § 13 (Id., § 7892-13), the original improvement district, unless otherwise provided by ordinance, shall include the property within the termini of the improvement to a distance back from the marginal lines thereof to the center of

the blocks facing or abutting thereon. In such a district, the section further provides that the assessment shall be laid in accordance with the five-zone system therein specified. In the recent case of *Eggerth v. Spokane*, *supra*, it was held that the reassessment is a proceeding *de novo*, and that the city council has the power to enlarge the district for the purpose of reassessment. It was there said:

"The reassessment is a proceeding *de novo*. There can be no question of the council's power to enlarge the district for the purpose of reassessment."

The reassessment in question is upon an enlarged district because it extends back from the marginal lines of the improvement a greater distance than that fixed in the statute for the original district when the city council does not provide for an enlarged district to be covered by the original roll. The question then is, must the reassessment covering the enlarged district be laid in accordance with the five-zone system? To determine this question recourse must be had to the sections of the statute covering the matter of reassessment. In the sections of the statute authorizing a reassessment upon an enlarged district, we find no provision which requires that the assessment shall be spread in accordance with the five-zone system. It follows, therefore, that in this case the reassessment roll is not invalid because not laid in accordance with the five-zone system.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment confirming the reassessment roll.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 13093. Department Two. May 13, 1916.]

P. M. Cartier Van Dissel *et al.*, *as Springdale Water Works, Appellants*, v. Holland-Horr Mill Company, *Respondent*.[1]

Master and Servant—Independent Contractors—Waters and Water Courses—Riparian Rights. An upper proprietor operating a sawmill is not liable to a lower proprietor for damages through the operation of splash dams by an independent contractor delivering logs to the mill, on the theory of owing a nondelegable duty to protect the lower proprietors from improper use of the stream.

Waters and Water Courses—Riparian Rights—Public Water Supply. The use of waters to supply the inhabitants of a town with water for domestic purposes is not a riparian right, and no recovery for damages to such use can be based upon rights as riparian owners.

Appeal from a judgment of the superior court for Stevens county, Sessions, J., entered June 29, 1914, dismissing an action for an injunction and for damages, tried to the court. Affirmed.

Jesseph & Bourland, for appellants.

Peacock & Ludden, for respondent.

Morris, C. J.—Action to enjoin the use and recover damages claimed to have been suffered by reason of certain acts of respondent with reference to Sheep creek, a small nonnavigable stream in Stevens county. Judgment below denying any relief.

Appellants, as a partnership doing business as the Springdale Water Works, and their predecessors have, since 1898, furnished water for domestic purposes to the town of Springdale, by damming the creek and pumping the water into a small reservoir upon a hillside, from which the water flows through pipes into the town. Respondent operates a sawmill about three miles up the creek from Springdale, maintaining a dam for the storage of logs. The complaint is

[1]Reported in 157 Pac. 687.

that, owing to the small quantity of water in Sheep creek, respondent operated splash dams to float logs down to its mill pond, the effect of which was to cut off appellants' supply of water while the water was being impounded by the splash dams, and forcing too much water down the creek, rendering the water unfit for use for several days after the splash dams were opened. There were three of these splash dams, located approximately a mile apart. They were built in 1910 by one Brown, who had a contract to deliver logs at the mill, and their use was confined to a few days in the fall of 1910, when, being found impracticable, they were abandoned.

A review of the record convinces us that the judgment must be sustained. Brown was an independent contractor in the building and use of the splash dams. They were constructed by him against the advice of respondent, to enable him to fulfill his contract for the delivery of logs at the mill. Appellants admit that Brown was at liberty, under his contract, to choose his own method for delivering the logs to the mill, but contend that respondent was under the law obligated to prevent injury to appellant as a lower riparian owner, and hence respondent would be liable for the acts of Brown, because its (quoting from appellants' brief) "rights and duties, with reference to this stream, were nondelegable, and that by permitting the stream to be used by any of its agents or by one who, under other circumstances, would be an independent contractor, respondent became liable for their negligent and unlawful acts." The rule of nondelegable duty sometimes applied to municipalities, which appellant is seeking to lay hold of, has no application to a case like this. Brown's only contract was to cut and deliver logs at the mill at $4.50 per thousand. Under such a contract, no right or duty of any sort attached to respondent except to pay Brown upon a delivery of the logs. The case is so plainly within the independent contract rule that it is idle to discuss it.

Another bad feature in appellants' position is that they base their recovery upon their rights as riparian owners. The use of the waters of a stream to supply the inhabitants of a town with water for domestic purposes is in no sense a riparian right. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425. The use not being riparian, there is no right of recovery for injuries to such use.

There is also presented a question of costs in which we find no merit.

The judgment is affirmed.

HOLCOMB, MAIN, PARKER, and CHADWICK, JJ., concur.

[No. 13120. Department Two. May 15, 1916.]

JOHN ENGSTROM, *Respondent*, v. EDENDALE LAND COMPANY, *Appellant*.[1]

JUDGMENT—MODIFICATION—MATTERS NOT ADJUDICATED—EJECTMENT—APPEAL—DECISION—ISSUES—MATTERS. Where defendant had been using waters diverted across plaintiff's land under a prior right, and, a dispute having arisen as to the construction of a new ditch under an oral agreement to abandon or change the old one, plaintiff brought ejectment and succeeded to the extent that, on appeal, defendant was ordered ejected, unless he brought action within thirty days to condemn the new right of way across plaintiff's land, defendant is not entitled to a modification of the judgment allowing him to decline the condemnation, abandon the new right of way and return to the old ditch; since his rights, if any, in the old ditch, were not adjudicated in the action.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered September 10, 1914, refusing to modify a judgment entered on remittitur of the supreme court, after a hearing before the court. Affirmed.

Murphy & Grant, for appellant.

Rochford & Wilson, for respondent.

[1]Reported in 157 Pac. 683.

MAIN, J.—This is an appeal from the judgment of the superior court for Stevens county, which modified a judgment previously entered. The cause was here upon a former appeal, and the decision upon that appeal is reported in *Engstrom v. Edendale Land Co.*, 77 Wash. 658, 138 Pac. 302. After that decision had been rendered and the remittitur filed in the superior court, a judgment was entered. Thereafter the defendant in the action, the appellant here, petitioned for a modification of the judgment. A hearing was had upon this petition, and the judgment was modified only as to the description of the property.

The facts as they appear in the reported decision are substantially as follows: The plaintiff in the action was the owner of a certain tract of land. The defendant was a corporation engaged in irrigating lands adjoining those of the plaintiff. Stranger creek is upon the land of the plaintiff. For many years the waters of Stranger creek had been used by the defendant and its predecessors in interest for irrigation purposes, and had been diverted across the land of the plaintiff.

Prior to the beginning of the original action, the plaintiff and the defendant agreed orally that the defendant might change the course of the ditch across the plaintiff's land, and abandon the old ditch. The defendant, in pursuance of this oral agreement, went upon the land of the plaintiff, upon the line proposed for the new ditch, and began the construction of a ditch thereon, which was partially above the surface and partially beneath the surface. The plaintiff objected to the manner of constructing the ditch and flume, and the dispute between the parties arose. The plaintiff ordered the defendant to vacate the premises, which it refused to do, and thereupon brought an action in the nature of an ejectment. Upon the trial of that action the superior court adjudged that the plaintiff had a prior right in and to the waters of Stranger creek; that the defendant, within thirty days from the entry of the judgment, should lower its flume;

and that the plaintiff was entitled to damages in the sum of $50. Upon appeal, this judgment was reversed upon the damages allowed, and upon the adjudication of the prior right of the respondent in and to the waters of Stranger creek. The cause was remanded with leave to the appellant, within thirty days after the filing of the remittitur in the superior court, to bring an action to condemn the new right of way across the plaintiff's land; and if that action was not so brought, then, at the expiration of that time, a judgment in ejectment, and for $50 damages, was to be entered. The defendant declined to bring the condemnation proceeding within the thirty days after the filing of the remittitur in the superior court. It desired to abandon the new right of way and return to the old ditch through which it had carried water across the plaintiff's land for a number of years. In its petition for a modification of the judgment, the court was asked to adjudicate that it had a right to its old right of way.

The old right of way was not in issue in the original case. What the defendant's rights thereto, if any, may be, is not determined in the reported opinion. It is true, in that opinion it is stated that the defendant and its predecessors had for many years taken the waters of Stranger creek and carried them across the land of the respondent for irrigation purposes; but this statement was made in connection with a discussion of the question as to whether the defendant had such an interest in the waters of Stranger creek that it might exercise the right of eminent domain if that issue was material to the case. Obviously the defendant was not entitled, in this action when it filed its petition, to have its rights, if any, in and to the old ditch, adjudicated.

Judgment affirmed.

MORRIS, C. J., CHADWICK, PARKER, and HOLCOMB, JJ., concur.

[No. 13024. Department Two. May 17, 1916.]

D. KENNEDY, *Appellant*, v. A. H. NORTON *et al.*, *Respondents*.[1]

CORPORATIONS—STOCKHOLDERS—SUBSCRIPTION — PAYMENT IN PROPERTY—SUFFICIENCY. Where property turned over to a corporation in exchange for stock was of the value of the par value of the stock issued as fully paid up, the transfer is valid as full payment of the stock subscription, in the absence of fraud.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered January 29, 1915, upon findings in favor of the defendants, dismissing an action to recover upon an unpaid stock subscription, tried to the court. Affirmed.

L. H. Wheeler, for appellant.

D. W. Locke, for respondents Norton *et al.*

Coleman & Fogarty, for respondent Gardiner.

MORRIS, C. J.—Appellant is a judgment creditor of the Green Bay Logging & Timber Company, an insolvent corporation. Execution having been issued and returned unsatisfied, this action was brought against Gardiner and Norton upon an alleged unpaid stock subscription. The only question to be determined is whether Gardiner and Norton have fully paid for their stock.

Gardiner was one of the original stockholders of the logging company, subscribing to one-third of its capital stock of the value of $4,000. Gardiner and two associates were the owners of timber and logging contracts of the value of $12,000. Preferring a corporation to a common ownership, they organized the Green Bay Logging & Timber Company with a capital stock of $12,000, and turned the timber and logging contracts over to the corporation in exchange for fully paid and nonassessable stock. There seems to be little

[1]Reported in 157 Pac. 684.

doubt but that the property turned over to the corporation in exchange for the stock was of the value of $12,000. We find no evidence of any fraud in this transaction, and in the absence of fraud, such transfers are upheld. *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499; *Gold Ridge Min. & Dev. Co. v. Rice*, 77 Wash. 384, 137 Pac. 1001.

Subsequently Holmes, one of the original holders, transferred his one-third of the stock to Norton in exchange for notes and mortgages of a value in excess of $4,000, the face value of the stock.

These facts sustain the judgment, and it is affirmed.

HOLCOMB, MAIN, BAUSMAN, and PARKER, JJ., concur.

[No. 13094. Department Two. May 17, 1916.]

L. B. HARVEY, *Appellant*, v. T. T. RICHARDSON, *as Administrator etc., Respondent.*[1]

PHYSICIANS AND SURGEONS—ACTION FOR SERVICES—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a patient died after an extrahazardous operation and the physician sued to recover for his services, the defense of negligence is not made out merely by showing that no blood test was made before the operation to determine the oxygen carrying power of the blood, there being no attempt to show that the failure to take the blood test contributed to the death, or that such test had ever been made in operations of that character in that vicinity.

SAME—DEFENSES—CONTRACT. In an action by a physician for services in performing an operation, evidence of a remark by plaintiff, after the patient had refused to go to specialists recommended, that if she was willing to take a chance with him, he was willing to take a chance with her, does not raise the inference that plaintiff took the chance of losing the value of his services if the operation was not successful.

SAME. Where a physician, operating for goiter, did not contract to remove it, his right to recover for his services is not defeated by the fact that the operation was not successful.

[1]Reported in 157 Pac. 674.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered January 6, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Jesseph & Bourland, for appellant.

Rochford & Wilson, for respondent.

Morris, C. J.—Action by a surgeon to recover for professional services. Verdict and judgment for defendant, and appeal.

Under the pleadings, there was but one issue in the case, the value of the services. The patient was suffering from an exopthalmic goiter and, upon consulting appellant, was advised by him to go to Mayo Brothers, at Rochester, Minnesota, for surgical treatment. Not desiring to do so, the patient and her husband requested appellant to perform the necessary operation. The patient was thereupon sent to the hospital, and in a day or two the operation was undertaken. It progressed until about half of the goiter had been removed, when the patient died.

The respondent, over appellant's objection, introduced evidence that no blood test was taken prior to the operation, and that such a test was usual to determine the oxygen carrying power of the blood, which, if below a given point, renders an operation of this character extra-hazardous. The lower court was of the opinion that this testimony raised a question of negligence, and submitted instructions to the jury upon that theory. We think this was error. There was no evidence that the blood of the patient was below the required oxygen test, nor was there any attempt to show that the failure to take the blood test contributed to any extent to the death of the patient. Before a charge of negligence can be sustained against a physician or surgeon, there must be some evidence that the failure to use proper skill, either in the thing done or in the thing left undone, was the proximate cause of injury to the patient. In other

words, there must be some connection between the act and the result complained of. There was none in this case. The duty of a surgeon is set forth in *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. 880, where it is said:

"The contract implied by law from the mere employment of a surgeon is that he will treat the injury he is employed to treat with ordinary diligence and skill. This requires that he bring to its treatment such a degree of skill and diligence as surgeons practicing in the same general neighborhood, in the same line of practice, ordinarily have and exercise in like cases. He must not experiment in his treatment of the injury. On the contrary, if he desire to avoid liability for his mistakes, he must treat it in some method recognized and approved by his profession as most likely to produce favorable results. If there be more than one of these applicable to the particular case in hand, he is not, of course, liable for an honest mistake of judgment in his selection of the method; but if bad results follow, and liability therefor is to be avoided, it must appear that the treatment applied was approved and recognized, as well as that it was pursued with ordinary diligence and skill."

The undertaking of a physician or surgeon is not to cure his patient, nor does he insure that his treatment will be successful. Neither does the failure to perfect a cure evidence want of proper care or skill. It was known before the patient went upon the operating table that she was in a dangerous condition and that the operation would be extra-hazardous. That was the reason she was advised by appellant to seek the aid of Mayo Brothers. Appellant cannot be deprived of the reasonable value of his services because the patient died during the operation, unless there was some evidence that death was the result of some lack of skill on his part. There is no such evidence, nor any attempt to so prove. Respondent contented himself with showing that no blood test was made, leaving the jury to infer that in some way this contributed to the patient's death. Neither was there evidence that such test had ever been made in opera-

tions of this character in that vicinity, although it appears in the record that a number of these operations had been performed in this same hospital.

Respondent urges, in support of the judgment, a remark of appellant to the patient, after he had urged her to go to Mayo Brothers and she had refused, "Well, if you are willing to take a chance with me I will take a chance with you;" contending that, by this language, it was understood the patient took the chance of death and appellant took the chance of losing the value of his services unless the operation was successful. We see no connection between the remark and the inference.

It is next urged that appellant based his right of action upon a contract to remove a goiter, and not having removed it, his right of action failed. There is no evidence of such a contract, and appellant's right of action, under the evidence, cannot be so limited.

Because of the error in submitting the case to the jury, the judgment is reversed and the cause remanded for a new trial.

Holcomb, Main, Parker, and Chadwick, JJ., concur.

[No. 13352. Department Two. May 19, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Preston Mill Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

EMINENT DOMAIN—PERSONS ENTITLED — CONTRACT RIGHTS — PRIVATE WAY OF NECESSITY—STATUTES. A private way of necessity for a logging road may be condemned although the petitioner already has a lease thereof for as long a term as may be required, under 3 Rem. & Bal. Code, § 5857-1, making the right to condemn depend merely upon whether one has land so situated with reference to the land of another that it is necessary for its proper use and enjoyment to have a private way of necessity, without reference to any contract rights.

Certiorari to review a judgment of the superior court for King county, Ronald, J., entered February 25, 1916, denying the right to condemn a right of way for a logging road, after a trial to the court. Reversed.

Corwin S. Shank and *H. C. Belt*, for relator.

Chas. M. Fouts, for respondents.

MAIN, J.—This case was heard in this court upon an application for a writ of certiorari, and upon the hearing it was submitted upon the merits. Since the hearing, a transcript has been filed in which is embodied the judgment of the superior court.

The facts, as they appear in the petition and affidavit for the writ, so far as necessary to set them out, are substantially as follows: On February 4, 1916, and for some time prior thereto, the relator was the owner of a tract of land in King county, Washington, upon which there was a large quantity of valuable timber. In order that this timber might be logged and delivered to a mill or the market, it was necessary to construct a logging railroad over and across land owned by Frank Berger and wife. On November 14, 1912, Berger

[1]Reported in 157 Pac. 689.

and wife leased to the relator a strip of land for a period of one year, and for such other and further period of time as the relator might retain possession of the same. After the execution of this lease, the relator entered into possession of the strip of land covered thereby and constructed thereon a logging railroad.

During the legislative session of 1913, a law was passed authorizing the condemnation of land for logging railroads (Laws of 1913, ch. 133, p. 412; 3 Rem. & Bal. Code, § 5857-1 *et seq.*). In the case of *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994, the constitutionality of this law was sustained. It will be observed that the contract right which the relator had in this case was acquired prior to the passage of this act.

On February 4, 1916, the date above mentioned, the relator brought an action in the superior court for King county for the purpose of condemning a right of way across the land owned by Berger and wife for logging railroad purposes. The strip of land sought to be condemned was the same as that covered by the contract. At the time the action was instituted, the relator was in possession of this strip of land and operating a logging railroad thereon under its lease.

The trial court was of the opinion that, since the relator was in lawful possession of the strip of land sought to be condemned, the necessity for condemnation did not exist, and entered a judgment adjudicating that a necessity for the condemnation did not exist. The case is here for the review of that judgment.

To the petition and application filed in this court, the respondent demurred. By the demurrer, it is admitted that, for the purpose of logging the relator's land, it is necessary to have a logging railroad constructed and operated over and across the land of the Bergers. But it is claimed that, since the relator has this right by contract, it has no right under the statute to condemn. The sole question here for determination is whether the relator can exercise the right

of condemnation given by the law, when it is rightfully in possession under its contract of the land sought to be condemned.

The question presented requires a construction of § 1 of the statute. That section provides:

"An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . on, across, over or through the land of such other . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity . . . The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads . . . over . . . which timber, stone, minerals or other valuable materials and products may be transported and carried." 3 Rem. & Bal. Code, § 5857-1.

The portions of the statute omitted indicated by the stars are not here material.

By § 2 (Id., § 5857-2) of the statute, the procedure for the condemnation of land for a private way of necessity is the same as that provided for the condemnation of private property by railroad companies. It should be noted that this statute gives an owner of land which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity the right to acquire such right of way by condemnation, and that the definition of the term private way of necessity includes logging roads. There is no provision in the statute requiring a person desiring to acquire a right of way for a logging road to first attempt to secure that right of way from the owner of the land over which the road must pass by private contract. Neither is there any provision in the statute that prevents the condemnation if a right has previously been acquired by contract. Under the statute, the right to condemn exists when land is so situated

with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity.

Under the admitted facts in this case, the relator's timber land is so situated with respect to the land of the Bergers that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity. If it were necessary as a precedent condition to the right to condemn to first attempt to acquire the right by contract, it would make the test of whether the right existed depend upon whether the right could be acquired by private contract for a reasonable consideration. If the right to condemn is denied to one who has previously acquired a right by contract, then, in such a case, the right of condemnation would necessarily depend upon the validity of such contract, because, if the contract were valid, a right of condemnation would not exist, while if it were invalid, condemnation could be maintained. These are conditions not found in the statute. The right to condemn must be measured by the terms of the statute. As we read the statute, the right of condemnation does not in any sense depend upon what private agreement the parties may have made, or have attempted to make.

The cases cited bearing upon common law private ways of necessity shed little if any light upon the question, since the way of necessity here involved is purely statutory. The only question presented and decided in the case of *State ex rel. Mountain Timber Co. v. Superior Court, supra,* was the constitutionality of the law. The question whether the right to condemn under the statute would be denied if the party condemning had previously acquired a right by contract was not there involved.

The judgment of the superior court will be reversed, and the cause remanded for further proceedings.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 12734. Department One. May 20, 1916.]

DAVID FRASER, *Respondent*, v. HOME TELEPHONE & TELEGRAPH COMPANY, *Appellant*.[1]

CORPORATIONS—AGENCY—"UNDERWRITERS." An "underwriter" of the stock and bonds of a telephone company is not an agent of the company, as a matter of law, as underwriting in this sense is a purchase together with a guaranty of a sale of the bonds, by one who sells in his own interest only.

SAME—AGENCY BY ESTOPPEL—UNDERWRITERS. A telephone company is not estopped to deny the agency of an underwriter of its stocks and bonds from the fact that it held him out, and permitted him to advertise, as an underwriter to one who did not know what that term meant and therefore could not have acted upon it as a representation that he was an agent.

SAME — AGENCY — "UNDERWRITERS" — EVIDENCE — SUFFICIENCY. A telephone company cannot be held for the acts of an underwriter of its stocks and bonds, as its agent, in failing to deliver stock sold and converting the money paid therefor, where no representation was made that he was an agent of or ever represented the corporation, and it appears that he had merely underwritten certain of its stock and bonds, subscribed for and issued to another telephone company in payment for the construction of the telephone plant, in which the issuing company had no further interest; and it is immaterial that he used a prospectus of the company to aid in his sales, since there was no evidence of agency; especially where no demand was made on the company until three years after the purchase.

TRIAL—WAIVER OF ERROR—NONSUIT. Error in denying a nonsuit is not cured by waiver of defendant in going into the defense without offering evidence to strengthen plaintiff's case.

Appeal from a judgment of the superior court for Spokane county, Jackson, J., entered November 23, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover money paid. Reversed.

Post, Avery & Higgins, for appellant.

L. H. Prather, for respondent.

ELLIS, J.—Action to recover money claimed to have been paid for certain bonds and stock which were never delivered.

[1]Reported in 157 Pac. 692.

It is alleged that, about March 30, 1911, at the instance of the Home Telephone & Telegraph Company of Spokane, Thaddeus S. Lane and Joshua B. Langley, plaintiff subscribed for $2,000 of first mortgage bonds of the company with $1,000 of its capital stock as a bonus, paying at the time $500, balance to be paid within ten months at his convenience; that, on June 13, 1911, he paid $500 more; that defendants Lane and Langley represented that they were acting for the corporation and that the bonds and stock would be delivered in proportion to the money paid; that defendants converted the money paid to their own use, to plaintiff's damage in the sum of $1,200; that he has demanded from the Home Telephone & Telegraph Company the bonds and stock or the return of his money, both of which were refused. Defendant Langley was never served with summons and did not appear. The other two defendants answered, denying the material allegations of the complaint. The cause was tried to the court and a jury. At the close of plaintiff's evidence, both defendants moved for a nonsuit, which was granted as to Lane but denied as to the Home Telephone & Telegraph Company. That company introduced evidence in defense. The jury returned a verdict against it for the sum of $1,211, and judgment was entered thereon. The defendant corporation moved for a new trial, which was overruled. It appeals, urging error in the refusal to grant a nonsuit, that plaintiff's case was not strengthened by defendant's evidence, and that the evidence as a whole is insufficient to sustain the verdict.

Respondent's evidence was permitted to take an extremely wide range in an endeavor to prove that Langley, through whom he subscribed for the purchase of the bonds and stock, was agent for appellant, Home Telephone & Telegraph Company, or at least that respondent, under the circumstances, had the right to so assume and that appellant is estopped to deny it. The circumstances relied upon by respondent are that one Taylor, with whom he was acquainted, told re-

spondent that he was working for the Home Telephone & Telegraph Company selling its bonds and stock; that Taylor on two occasions took him through the telephone company's building and showed him the plant; that on one of these occasions they chanced to meet Lane, the president of the telephone company, leaving the building, and Taylor introduced respondent as a prospective stockholder; that Lane said, "I hope you will join us," or something to that effect; that Taylor also introduced respondent to Langley, who had an office in the telephone company's building; that Langley showed him a prospectus describing the telephone plant, its business and prospects, and containing the names of its officers and some of their pictures, among them that of Lane, as its president, and one F. M. March, as its treasurer. This prospectus contained the statement that the securities of the company are in the form of stocks and bonds, the bonds in denominations of $100, $500 and $1,000, and that:

"The issue has been underwritten by J. B. Langley of Boston, Mass., who maintains an office at 167 South Howard street, in this city, where he deals exclusively in high grade public utility bonds of various kinds."

On Langley's window and letter heads appeared the legend, "J. B. Langley, Underwriter of high grade Public Utility Bonds." Taylor, as a witness for plaintiff, testified that, during the time when he was working with Langley in the sale of these securities, Langley also sold other securities besides those of the telephone company. Respondent testified that, when he agreed to take the bonds and stock, he signed some sort of paper called a subscription card. There is no evidence of its terms. Langley gave respondent a receipt for the $500 then paid, stating that it was,

"To be applied on his subscription of two thousand of the Home Telephone & Telegraph Company, five per cent first mortgage gold bonds, with ten shares, one thousand dollars, of said stock as a bonus. Balance of fifteen hundred to be paid by Mr. Fraser at his convenience within ten months."

This receipt was signed "Joshua B. Langley, Underwriter." The receipt for the second payment was of the same character, except that it stated the bonus as $1,000 of Interstate Consolidated Telephone Company's stock. Lane, who was called as a witness for respondent, testified in substance that, in 1909, the Interstate Consolidated Telephone Company, a Montana corporation, entered into a contract with the Home Telephone & Telegraph Company to complete its then partially constructed plant up to a capacity of four thousand telephones, in consideration of which the consolidated company was to receive, and did receive, $570,000 of the bonds of the home company, and the same amount of its stock from time to time as the work progressed; that he first met Langley in the fall of 1910, in Chicago; that he made a contract with Langley on behalf of the Interstate Consolidated Telephone Company, of which he was president, whereby Langley purchased from the consolidated company a certain number of the securities of the home company owned by the consolidated company, the agreement being that he was to take $10,000 worth each month for a certain period of time and pay for them; that it was to sell these securities; that Langley came to Spokane, and that he never sold any stock or bonds for the Home Telephone & Telegraph Company or had any connection with that company. This testimony is wholly uncontradicted. There is no evidence that Lane or any one else connected with the Home Telephone & Telegraph Company ever represented to the respondent that Langley was agent for, or in any manner represented that company in selling the stock and bonds. There is no evidence that Langley ever represented himself as an agent for that company. Upon this evidence, we are satisfied that a nonsuit should have been granted.

It is insisted that, because Langley, with the knowledge of the officers of the Home Telephone & Telegraph Company, represented himself as having underwritten its bonds, that company is estopped to deny that he acted as its agent in

selling the bonds. Unless an underwriter is, as a matter of law, an agent of the corporation whose bonds he underwrites, no matter with whom the underwriting contract is made, there is no evidence whatever in the record that Langley was in any sense an agent of the Home Telephone & Telegraph Company. There is nothing in the claim of estoppel, since respondent testified that, though he knew from the sign on Langley's window and from Langley's own statement to him that he held himself out as an underwriter, respondent himself did not know what that term meant, hence he could not have acted upon it as a representation that Langley was an agent for the home company. The first element of an estoppel is thus wanting.

An underwriting contract, aside from its use in insurance, is defined as follows:

"*Underwriting* means an agreement, made before the shares are brought before the public, that in the event of the public not taking all the shares or the number mentioned in the agreement, the underwriter will take the shares which the public do not take." 1 Cook, Corporations (7th ed.), p. 74, § 14.

The same definition applies to an underwriting of corporate bonds. 3 Bouvier, Law Dictionary (Rawle's 3d Revision), p. 3352. Underwriting, in this sense, is a purchase, together with a guaranty of a sale of the bonds. *Bone v. Hayes*, 154 Cal. 759, 99 Pac. 172. There is nothing in this form of underwriting which makes the underwriter, as a matter of law, agent of the company whose bonds or stock he underwrites. On the contrary, he is an ultimate purchaser of the stock, since he agrees to take what he does not sell. Obviously, in such a case, in selling the stock or bonds, he is acting solely in his own interest and to relieve himself from the necessity of taking them. Such is the necessary effect of the contract so defined, and respondent has cited no authority to the contrary.

Assuming, therefore, that Langley was in fact an underwriter of the bonds of the Home Telephone & Telegraph Company, the only evidence on the subject shows that he underwrote those bonds for the Interstate Consolidated Telephone Company, which company had taken them in payment for the construction of the telephone plant. We find no merit in the argument that, because these bonds and this stock had already been subscribed for and had been issued to the Interstate Consolidated Company, they could not be underwritten for that company. As a matter of fact, neither the stock nor the bonds had ever been placed before the public, and the undisputed evidence shows that Langley's contract, whether it be called an underwriting contract or a purchase, was made with the Interstate Consolidated Company for the purpose and with the intention of placing the stock and bonds before the public for the first time, Langley agreeing to take them and pay for them to the extent of $10,000 a month for a given period. Whether he sold them or not was obviously his own affair and a matter in which the Home Telephone & Telegraph Company, at least, was in no sense interested. The fact that Langley, as an aid in selling the bonds, used a prospectus of the Home Telephone & Telegraph Company, which the evidence shows he got out at his own expense, had no tendency to prove an agency for that company. He was selling bonds and stock of that company. Naturally he would use the prospectus in advertising them, whether acting for himself or for another. It may be that this prospectus contains some misrepresentations; for instance, F. M. March was not the treasurer of the company, though the evidence shows that it was originally intended that he should be. That, however, is immaterial. The respondent did not sue for misrepresentation or fraud, but for the failure to deliver the stock and bonds. This also disposes of the claim that, because March indorsed one of the checks given by respondent in payment for this stock, the Home Telephone & Telegraph Company probably received the money. The un-

disputed evidence shows that Langley did not pay the proceeds of either check to the Home Telephone Company or to any of its officers. The nonsuit should have been granted.

The evidence introduced on behalf of appellant in no sense tended to strengthen respondent's case. It showed conclusively, and without contradiction, Langley's purchase of the stock and bonds from the Interstate Consolidated Telephone Company, and that that company had taken the stock and bonds in payment for the construction of the Home Telephone & Telegraph Company's plant. The respondent made no effort to secure the bonds and stock from Langley, and made no inquiry from the Home Telephone & Telegraph Company until long after the plant had been completed and Langley had left Spokane. The demand for the stock and bonds or the return of the money was made on the Home Telephone & Telegraph Company in May, 1914, over three years after the purchase. If he had thought from the beginning, as he now claims, that he was dealing with the Home Telephone & Telegraph Company, it seems inexplicable that he did not make some demand or inquiry of that company earlier.

The evidence as a whole is insufficient to sustain the verdict. By going into its defense, appellant waived the motion for a nonsuit only to the extent of allowing respondent to benefit by any evidence introduced by appellant or by himself in rebuttal. Since no such evidence strengthened respondent's case, the error in refusing to grant a nonsuit is not cured. Appellant still has the right to urge the motion for a nonsuit on appeal. *Matson v. Port Townsend Southern R. Co.*, 9 Wash. 449, 37 Pac. 705; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471.

Judgment reversed and cause remanded for dismissal.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 12869. Department One. May 20, 1916.]

JOHN WELSH, *Respondent*, v., SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Appellant*.[1]

CARRIERS—PASSENGERS—SETTING DOWN PASSENGERS — INTERURBAN CARS. The rule applicable to street cars that the relation ordinarily terminates when the passenger gains a secure footing upon the street, applies to one alighting from an interurban train.

SAME—SETTING DOWN PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence is not shown in allowing an intoxicated passenger to alight unattended from an interurban car, with many other passengers, on a safe unobstructed city street, whereupon he leaned against the car with his foot on the rail and was injured when the train moved, where there was no evidence that he staggered or required special attention when leaving the car, or that any one knew of his dangerous position, although it was known that he was intoxicated when he boarded the train; since actual knowledge of his incapacity was lacking, and he was discharged at a safe place, without any knowledge of his dangerous position.

Appeal from an order of the superior court for Spokane county, Webster, J., entered December 1, 1914, granting a new trial, after the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries. Reversed.

Graves, Kizer & Graves, for appellant.

Samuel T. Crane and *John Salisbury*, for respondent.

ELLIS, J.—Action to recover damages for personal injuries. The material facts are as follows: On October 5th, 6th and 7th, plaintiff was at St. Maries, Idaho, where he indulged freely in intoxicating liquor during the 6th and up until two o'clock in the afternoon of the 7th, when he boarded a boat for Coeur d'Alene. He had no liquor with him nor procured any while aboard the boat. Arriving at Coeur d'Alene, he started for the depot. Not knowing where it was, he inquired of a man on the street, who volunteered

[1]Reported in 157 Pac. 679.

to show him. At the depot, he purchased a ticket for Spokane and checked his baggage. His train not having arrived, he and the new acquaintance went across the street where he had two or three drinks. After that they returned to the sidewalk to await the train. He remembers he knew when it arrived, that he staggered, and that his new friend and one of the train crew assisted him into the car, the latter remarking that he was "pretty full." Plaintiff slept throughout the journey from Coeur d'Alene to Spokane. He had no liquor after leaving Coeur d'Alene.

Apparently, after the train had come to a stop at Main and Stevens streets, in Spokane, a trainman awakened him and informed him of the arrival. He was sober enough to know that the passengers were getting off the car and that there were quite a number of them. He also knew and remembered that he occupied the second seat in the front car and that he followed the other passengers from the car. After stepping to the street, he seems to have turned and leaned against the car, with his face to the car and his right foot on the track immediately in front of a truck. He knows he did not stand that way very long, and thought all the passengers got off the train. He testified that he knew what was going on and that he could walk and talk at the time. The train was started and ran over his right foot, throwing him to the ground and crushing and bruising all the toes and a portion of the foot above the toes. He was immediately taken to the emergency hospital and all of the toes except the great toe on his right foot were amputated. The surgeon who operated, and his assistant, both testified that plaintiff was intoxicated when brought into the hospital, that he could not talk, that he staggered, that he did not seem to feel the pain and required no anaesthetic during the operation.

At the close of the testimony, the defendant moved for a directed verdict. The motion was granted and the jury was discharged. Plaintiff then moved for a new trial. This mo-

tion was likewise granted. From the order granting a new trial, defendant appeals.

Appellant contends that respondent's evidence was insufficient to make a *prima facie* case, and that the granting of the motion for a new trial was therefore error. The order granting a new trial was based upon the express ground that, under the circumstances, defendant owed plaintiff the duty of using a degree of care commensurate with his condition, and that, in view of that condition, the relation of passenger and carrier had not terminated at the time of the injury, and that the case should have been submitted to the jury. The car on which respondent was a passenger was one of an electric interurban train. The rule applicable to street cars governs in determining when the relation of carrier and passenger ends as to one alighting in a street from an interurban train. In the absence of any unusual inherent danger, defect or obstruction in the place of alighting, that relation ceases upon the alighting passenger gaining a secure and maintainable footing upon the street. Nellis, Street Surface Railroads, page 449; *Gannaway v. Puget Sound Traction, Light & Power Co.*, 77 Wash. 655, 138 Pac. 267. Clearly, unless continued by respondent's intoxication, the relation of carrier and passenger had ceased at the time of the injury.

It is argued, however, that respondent's condition was such as to impose on the carrier the duty of extraordinary care for his safety, even after the relation of carrier and passenger otherwise would have ceased. Respondent cites, and mainly relies upon, the case of *Sullivan v. Seattle Elec. Co.*, three times appealed to this court and reported in 44 Wash. 53, 86 Pac. 786; 51 Wash. 71, 97 Pac. 1109, 130 Am. St. 1082, and *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825. That case, however, is readily distinguishable upon the facts. Deceased was visibly crazed with drink and was plainly incapacitated by his intoxication. That condition continued up to the very time when he was finally permitted to alight alone on a platform partially un-

guarded, over the waters of a lake some twenty-six feet deep, and near ten o'clock on an extremely dark night. The defendant's servants had actual knowledge of his helpless condition up to the very time of his leaving the car, and of the dangers of the locality. The question whether the place was reasonably safe for discharging a passenger in his known condition was held one for the jury. True, on the first appeal, this court said:

"The rule is that a carrier owes to a passenger a duty commensurate with his condition. After it receives a passenger who is helpless or incapacitated it must exercise towards him that degree of care necessary to keep him from harm. A carrier is not obligated to receive a helpless, imbecile, or drunken person as a passenger, when unattended, but if it does so receive such a one, it must give him such care as will insure him a safe passage to some proper designation. It cannot lawfully put him off, or permit him to get off, at a place where there is danger of his perishing or coming to harm, even though such a place would be reasonably safe for one in a normal condition. In this case whether the carrier exercised this degree of care towards the deceased was a question for the jury, and the court erred in taking it from them."

But that is far from saying that there would be any negligence in allowing even a drunken man to alight at his destination, with many other passengers, on a safe and unobstructed city street. The language above quoted was used in the light of the facts there involved. With full knowledge of the man's condition and of the dangers of the locality, the conductor ought to have anticipated the very accident which happened. At any rate, the question of negligence was one for the jury. The distinction which we have marked is made clear in the opinion on the second appeal of the *Sullivan* case, reversing a judgment for plaintiffs because of an instruction to the effect that, if defendant's servants knew of Sullivan's helpless condition,

"or by the exercise of reasonable care, that is, such care as a reasonably prudent person, engaged in like occupation

would ordinarily exercise under similar circumstances to ascertain the condition of a passenger, should have known that he was in such an intoxicated condition as to be unable to care for himself,"

then it was their duty to take such precautions for his safety as required by surrounding circumstances. We said:

"This instruction is erroneous. A conductor has a right to presume that every passenger entering his car is both sane and sober until he has actual notice to the contrary. He is not compelled to make a mental or physical examination to ascertain his condition, and the doctrine of imputed or implied notice has no application to such a case."

We then quoted with approval the following:

"If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself in a place of danger. If a passenger, however, while in such condition as averred, does place himself in a place of peril, then before the company can be held liable if an injury results therefrom it must be proven that the agents or servants operating the train knew that fact—not that they should have known it because of any duty by law imposed on the company to watch such passenger—but the actual fact of such perilous position must be brought home to the knowledge of the servants operating such train. The company was not bound to have its servants at the rear platform of the coach on which Carr was sitting at Mulkeytown for the reason that it owed him no such duty, as he had not indicated any intention of alighting there, and in fact he did not intend to do so." *St. Louis etc. R. Co. v. Carr*, 47 Ill. App. 353.

"We think, however, if a passenger is in need of special assistance, either from sickness or other misfortune, and this fact is known to the employees of the carrier, it is their duty to render it; but they are not required to anticipate such wants or needs. The trial court therefore erred by inserting into the instructions given to the jury the idea that it was incumbent upon the employees of the appellant to observe the condition of the passengers in order to see whether or not they needed assistance. This thought is embraced in the use of the expression 'or was apparent' in the instructions after

stating the duty of the employees of appellant if appellee's health was known to them. As said before, if the employees of the railroad knew that the appellee was in feeble health, and needed assistance, it was their duty to render her such reasonable help as lay in their power in order that she might alight from the car in safety. But they owed her no duty of observation to ascertain her condition, and therefore the expression 'or was apparent' should have been omitted." *Illinois Cent. R. Co. v. Cruse*, 29 Ky. Law. 914, 96 S. W. 821.

In the case before us, the only evidence of notice of respondent's condition on the part of appellant was that he staggered when he boarded the car at Coeur d'Alene, Idaho, and that he was aided by one of the train men, who remarked that he was pretty full. There is no evidence that he staggered or in any manner evinced a state of intoxication, when leaving the car at Spokane. In the absence of such evidence, there was no duty upon appellant's servants to make a physical or mental examination to ascertain his capacity, nor to place a guard over him to prevent him from going into a place of danger after he had safely left the car. So far as the record shows, he then gave no evidence showing need of special attention. His condition at that time is best shown by his own testimony. He knew where he was. He knew that it was the place at which he intended to alight. He knew that many other passengers were leaving the car at that place. He knew exactly what he was doing. He knew just where he sat in the car. He knew that he walked down the steps of the car and that he turned and leaned against the car. He detailed his exact position at the time of the accident. There is no evidence whatever that any of appellant's employees knew that he had placed himself in this dangerous position, nor evidence of anything in his carriage or conduct in leaving the car to cause them to anticipate such an act. Under such circumstances, they had done their whole duty when they discharged him safely at a safe place. As said by this court in the third appeal of the *Sullivan* case, *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825:

"When one becomes a passenger upon a car of a common carrier of passengers, he continues to be a passenger until such time as he has safely alighted from the car in a reasonably safe place."

The converse is certainly true, in the absence of actual knowledge on the carrier's part that the passenger is at the time incapable of taking care of himself. 3 Thompson, Negligence, § 2935; *Illinois Cent. R. Co. v. Cruse*, 123 Ky. 463, 96 S. W. 821, 8 L. R. A. (N. S.) 299; *Raben v. Central Iowa R. Co.*, 74 Iowa 732, 34 N. W. 621.

"A man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and by such loss of control contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor." *Strand v. Chicago & W. M. R. Co.*, 67 Mich. 380, 34 N. W. 712.

See, also, *Burleson v. Morrisville Lumber & Power Co.*, 86 Vt. 492, 86 Atl. 745; *Little Rock R. & Elec. Co. v. Billings*, 173 Fed. 903; *Johnson v. Louisville & N. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. 39; 3 Hutchinson, Carriers (3d ed.), § 1230; *Conrad v. Graham & Co.*, 54 Wash. 641, 103 Pac. 1122, 132 Am. St. 1137; *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934, 48 L. R. A. (N. S.) 640; *Knapp v. Northern Pac. R. Co.*, 56 Wash. 662, 106 Pac. 190.

Though appellant had notice that respondent was to some extent intoxicated when he boarded the car at Coeur d'Alene, Idaho, he was safely landed in the street in Spokane, a place, so far as the record shows, perfectly safe for a man in his apparent condition.

"Where the carrier has done his full duty in respect of the removal of a drunken passenger from the train, he will not be liable because the passenger afterwards wanders back upon the track and is struck and injured by a passing train." 2 Hutchinson, Carriers (3d ed.), § 994.

In *Gaukler v. Detroit, G. H. & M. R. Co.*, 130 Mich. 666, 90 N. W. 660, on a state of facts much similar to those here presented, the court held that it was not incumbent on carriers' servants "to do more than to see that the man, in his apparent condition, left the railway premises," and that "if there was any negligence at any stage of the proceeding . . . it ceased as a factor in this case when the plaintiff left the premises and reached a place of safety," and that a verdict should have been directed.

See, also, *McClelland v. Louisville, N. A. & C. R. Co.*, 94 Ind. 276; *Nash v. Southern R. Co.*, 136 Ala. 177, 33 South. 932, 96 Am. St. 19.

It must be borne in mind that, in order to fix liability upon the carrier in such a case as this, actual knowledge of the incapacity of the passenger to care for himself must be shown. "The doctrine of imputed or implied notice has no application to such a case." Such knowledge was not shown. Moreover, he was, in any event, discharged at a perfectly safe place in company with many other passengers. Under these circumstances, there was no duty upon appellant to further guard him, in the absence of knowledge that he had placed himself in a dangerous position. Of such knowledge, there is no evidence. The fact that it subsequently developed that he was grossly drunk does not supply the essentials of knowledge on the carrier's part. The trial court properly granted the nonsuit. It follows that the order granting a new trial was error.

Order reversed, and cause remanded for dismissal.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12979. Department Two. May 20, 1916.]

THOMAS D. ROBINSON, *Appellant*, v. WESLEY STEELE *et al.*, *Respondents*.[1]

PUBLIC LANDS—HOMESTEADS—TITLE—FINAL PROOF—PATENT. The title of the government passes to a homestead claimant at the time of making final proof, and such is the effect of the patent, though issued thereafter; and not at the time when the claimant's right to make proof matured.

INDIANS—ACQUISITION OF HOMESTEAD—LIMITATIONS ON ALIENATION—STATUTES. The act of 1884 (23 St. at L. 96) providing that all patents for homesteads selected by such Indians "as may now be located on public lands, or as may . . . hereafter so locate," shall limit the power of alienation for the period of twenty-five years, is intended to supplement and modify the act of 1875 (18 Id., p. 420) providing that the title to lands acquired by Indians under the homestead laws shall not be alienated for a period of five years; and the same applies to lands for which final proof was not made at the time the act of 1884 was passed, although the right had matured.

SAME—LIMITATION ON ALIENATION—EXTENSION—POWER OF CONGRESS. Congress has power to extend the period of limitation upon the power of alienation of Indian homesteads, between the time of making the original entry and the perfection of title by final proof.

SAME—LIMITATION ON ALIENATION—REMOVAL—JUDGMENT QUIETING TITLE—VALIDITY. Where Indians alienated their homesteads prior to the expiration of the twenty-five years limiting their power to do so, a default judgment quieting the title as against the Indians, upon service by publication, is ineffective, since it is not binding upon the United States, which holds title in trust for the sole use of the Indians, under the express provisions of the act of 1884 (23 St. at L. 96).

VENDOR AND PURCHASER—RESCISSION BY VENDEE—ACTS CONSTITUTING. There are sufficient unequivocal acts of rescission by the purchasers where, upon discovery of failure of title, they timely refused to pay the balance due upon the first purchase money note at maturity, or other notes declared due, or to receive the deed tendered to them.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered March 24, 1915, upon findings in

[1]Reported in 157 Pac. 845.

favor of the defendants, in an action upon promissory notes, tried to the court. Affirmed.

Ben F. Tweedy and *Elmer E. Halsey*, for appellant.

Fred E. Butler, for respondents.

PARKER, J.—The plaintiff, Thomas D. Robinson, commenced this action in the superior court for Asotin county, seeking recovery upon five promissory notes for $900 each, payable to him and executed by the defendants, Steele and Kennedy, as the purchase price of three hundred and sixty acres of land situated in that county. The defendants admit the execution of the notes as the purchase price of the land. Their defense is, in substance, that the plaintiff does not have, and never has had, good title to three hundred and twenty acres of the land, nor any power to convey the same, and that there is, therefore, such a failure of consideration for the notes as entitles the defendants to rescind their contract for the purchase of the land and have the notes surrendered and cancelled. Trial in the superior court without a jury resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed to this court.

The controlling facts may be summarized as follows: On May 6, 1878, Moses and Henry, Nez Perce Indians, having abandoned their tribal relations, each filed in the United States land office, at Walla Walla, his application to enter as a homestead one hundred and sixty acres of the land here in question, it then being public land of the United States subject to homestead entry. These entries were made under the act of Congress of 1875, entitling Indians who have abandoned their tribal relations to acquire homesteads upon the public lands of the United States open to entry under the general homestead laws, subject to limitation upon the right of alienation as expressed in the act of 1875 as follows:

"*Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation

or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor." 18 Statute at Large, Part 3, p. 420.

On July 4, 1884, long before Moses and Henry made final proof entitling them to patents for their homesteads, there became effective, by approval of the president, an act of Congress which in effect amended the act of 1875, in so far as restrictions upon the right of alienation of homesteads acquired by Indians is concerned, as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the secretary of the interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 23 Statute at Large, p. 96.

On March 23, 1897, Moses and Henry each made final proof of his residence upon and cultivation of his homestead, which being approved by the register and receiver of the land office at Walla Walla, and the delay in making final proof being found to be excusable, on April 24, 1897, final certificates were issued evidencing the right of Moses and Henry to patents for their respective homesteads. Patents

were accordingly issued in due course on June 10, and October 18, 1898, respectively, each of which patents contains the following provision:

"This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance either by voluntary conveyance or by judgment, decree, or order of any court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof as provided by act of Congress approved January 18, 1881."

This is the only language of the patents relating to restrictions upon alienation, and is manifestly erroneously inserted in these patents because it is not the restriction upon alienation prescribed by either the act of 1875, under which the original homestead applications were filed, or the act of 1884, under which, as we view the case, the final proofs were made and patents issued. On December 1, 1906, Moses executed a warranty deed purporting to convey his homestead land to appellant, and on August 1, 1910, Henry executed a warranty deed purporting to convey his homestead land to appellant. On August 24, 1912, appellant entered into a contract with respondents, Steele and Kennedy, for the sale of these two one hundred and sixty-acre tracts and an additional tract of forty acres, for the agreed purchase price of $4,500, for which respondents executed the five promissory notes here sued upon, payable on August 24, 1913, 1914, 1915, 1916 and 1917, respectively. These notes, together with a warranty deed for the land, signed and acknowledged by appellant and his wife, naming respondents as grantees, but not delivered to them, were by agreement of all parties deposited in escrow in the First National Bank of Lewiston, Idaho. By the terms of the escrow agreement under which this deposit was made, the bank was to deliver the deed to respondents upon full payment of all of the notes. Upon the failure of respondents to pay the notes as they matured, appellant was, by the terms of the escrow agreement, privileged to choose one of two remedies, as follows:

"If the said grantees shall at any time fail to pay either of said promissory notes at the time the same become due, and within twenty days after written notice so to do by the grantors, Thomas D. Robinson and May Robinson, then all sums paid under this contract shall be forfeited to the said Thomas D. Robinson and May Robinson and the deed above referred to shall be returned to them, and the promissory notes remaining unpaid shall be returned to the said grantees. If default be made in any of the payments of principal or interest as evidenced by said promissory notes, after twenty days notice in writing so to do, the said grantors may, at their election, deliver said deed to said grantees and declare all sums evidenced by any remaining unpaid promissory notes as immediately due and payable and sue for the balance due under this agreement."

In October, 1913, the first note having matured and a balance due thereon remaining unpaid, appellant caused the bank to tender to respondents the deed held by it in escrow, and at the same time notified respondents that he elected to declare all of the notes immediately due and payable because of default in the payment of the first note. Soon thereafter this action was commenced. Respondents declined to pay the balance due upon the first note, and also declined to receive from the bank the deed tendered to them, because, a short time prior thereto, they discovered, through the advice of their attorney who had examined the abstract of title of the land recently furnished by appellant, that appellant did not have good title to three hundred and twenty acres of the land because of the legal restrictions upon the power of Moses and Henry to alienate their homesteads consisting of three hundred and twenty acres of the land, less than fourteen years having elapsed since the making and accepting by the land office of the final proof of Moses and Henry entitling them to patents. The contract for the sale of the land from appellant to respondents apparently contemplated that respondents go into possession thereof, which they did to the extent of running some sheep thereon. We think the record warrants the conclusion that they have not been in

possession of the land since the commencement of this action, and that they have at no time since then claimed the right of possession thereof. There is an indorsement upon the first note indicating that $500 was paid thereon on January 6, 1913. By their affirmative answer and cross-complaint, respondents ask judgment against appellant for this sum. This was denied by the trial court, though it is not entirely clear upon what ground. However, this determination by the court is not appealed from by respondents.

The principal question in this controversy is as to the power of alienation possessed by Moses and Henry at the time they executed the deeds purporting to convey their homestead lands to appellant in the years 1906 and 1910. If the restriction upon their power of alienation was for only five years following their final proof and the issuance of patents thereon, as prescribed by the act of 1875, appellant acquired title to the lands by the deeds so executed. If, on the other hand, the restriction upon the power of alienation was for the period of twenty-five years following final proof and the issuance of patents thereon, as prescribed by the act of 1884, such deeds were void and appellant did not thereby acquire title to the lands. Appellant's counsel contend that the five-year limitation, restricting the power of alienation as prescribed by the act of 1875, is alone applicable; while respondents' counsel insists that the twenty-five year limitation, restricting the power of alienation as prescribed by the act of 1884, is applicable. That the twenty-year limitation attempted to be prescribed by the language of the patents above quoted is not applicable, is conceded. These provisions of the patents seem to have been erroneously inserted therein in an attempt on the part of the land department to comply with the act of 1881; which act, however, has reference only to homesteads acquired by the Winnebago Indians of Wisconsin. 21 Statutes at Large 317. This erroneous provision has been noticed in a number of patents for Indian homesteads other than to those of the Winnebago Indians, and held by

the courts to be inapplicable and of no effect. *United States v. Saunders*, 96 Fed. 268; *United States v. Hemmer*, 195 Fed. 790; *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779.

Our problem then is, since the limitation prescribed by the language of these patents has no controlling force, Is the limitation upon the power of alienation that prescribed by the act of 1875 or that prescribed by the act of 1884? In other words, under which of these laws did Moses and Henry acquire title to their homesteads?

Counsel for appellant proceed upon the theory that, since the original applications for the homesteads were filed and settlement made by Moses and Henry under the act of 1875, before the passage of the act of 1884 extending the period of restriction upon alienation to twenty-five years, and since a period of more than five years elapsed after the filing of their applications and commencing their settlement of the land, enabling them to make final proof entitling them to patents therefor before the passage of the act of 1884, they had, prior to the passage of that act, fully earned their patents, and that therefore, though their final proof was made and patents issued long after the act of 1884, their titles should be held to have been perfected prior to the passage of that act and while the act of 1875 was in force prescribing the five-year limitation upon their power of alienation, which five-year limitation had expired long before the execution of their deeds to appellant.

The fallacy of this theory lies in the fact that title to the land is not earned by a claimant under the homestead law until the required final proof is made by him. Section 2291 of the Revised Statutes of the United States, relating to acquisition of land as a homestead, in express terms requires, manifestly as one of the things to be done by a claimant in earning title, that after five years from the date of his original entry he must prove his required residence upon and cultivation of the land, make affidavit that no part of the land has been alienated, and that he will bear true allegiance to the

government of the United States. "Then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent." It may be conceded in this case, though we do not so decide, that, by the doctrine of relation, the title of the government passes to the claimant as of the time of his making final proof and that such is the effect of the patent, though issued thereafter; but no authority has come to our notice, and we think there is none, holding that title passes from the United States to the claimant under the homestead law prior to the making of his required final proof. This is recognized as the law by the decision of this court in *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043. We think, therefore, that title to these lands was not earned by Moses and Henry and did not pass to them in any event until they made final proof in the year 1897, long after the passage of the act of 1884 withholding the power of alienation of such Indian homesteads for twenty-five years following the acquisition of title thereto.

It seems to us that the decisions of this court in *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779, and *Frazee v. Piper*, 51 Wash. 278, 98 Pac. 760, are decisive of this branch of the case in respondents' favor. Frazee and wife, Indians, made settlement upon an original homestead entry of land in March, 1883, and made final proof entitling them to patent therefor in May, 1890. In the meantime, the act of 1884 having been passed, it was held that they acquired title to their homestead under the act of 1884 prescribing the limit upon the power of alienation of such homesteads for a period of twenty-five years. It is true, as suggested by counsel for appellant, that they could not have earned and perfected their title by final proof before the passage of the act of 1884, in view of the fact that their original entry was less than five years prior to the passage of the act of 1884. We think, however, that the logic of those decisions is that the prescribed limit upon alienation in the act of 1884 would have been controlling, regardless of the fact that the original entry

might have been made at a sufficiently early date to have enabled Frazee and wife to make final proof entitling him to the patent before the passage of the act of 1884. The controlling fact in these cases was, as we read them, that Frazee and wife did not make their final proof giving them the right to a patent prior to the passage of the act of 1884, regardless of the time when such proof could have been made. In *Frazee v. Piper*, at page 285, the court quoted with approval from the opinion of the Attorney General of the United States as follows:

"I am of the opinion that this act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875 for which patents had not issued at the time the act of 1884 went into effect. Opinions of Attorneys General, vol. 19, p. 166."

In *Frazee v. Spokane County*, at page 282, that case is distinguished from the decision of the Federal court in *United States v. Saunders*, *supra*, holding that the five-year limitation of the act of 1875 was applicable because in that case the claimant had fully earned his title by making final proof before the passage of the act of 1884. The decision of Judge Elliott of the Federal court for the Southern District of South Dakota, in *United States v. Hemmer*, *supra*, is directly in point here, since it deals with conditions arising under the acts of 1875 and 1884 in substance the same as those here involved, wherein the court reaches the conclusion that the twenty-five year limitation upon the right of alienation, as prescribed by the act of 1884, was there applicable.

That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads between the time of the making of the original entry by a claimant and the time of the perfection of his title by making final proof, is settled by the decisions of the Federal courts. *United States v. Allen*, 179 Fed. 13; *United States v. Hemmer*, *supra*; *Tiger v. Western Inv. Co.*, 221 U. S. 286. We

conclude that the deeds executed and delivered by Moses and Henry to appellant, long prior to the expiration of twenty-five years following the making of their final proof perfecting their right to patents, conveyed no title whatever to appellant.

In November, 1911, appellant, being doubtful of the validity of his title acquired by the deeds executed by Moses and Henry, instituted an action against them in the superior court for Asotin county, in which action, they being served by publication and being in default, judgment was rendered in appellant's favor, quieting his title as against the claims of Moses and Henry. This judgment is also relied upon by counsel for appellant as being a final adjudication and binding upon all parties concerned as divesting Moses and Henry of all interest and title in and to these lands. The trouble with this contention is that that judgment was not binding upon the United States, the guardian and trustee of Moses and Henry in so far as these lands are concerned. Not only was the United States the guardian of Moses and Henry in so far as the title to these lands are concerned, but by the express terms of the act of 1884, above quoted, the legal title thereof was still in the United States in trust for Moses and Henry, and will so remain until the expiration of the twenty-five year period prescribed by the act of 1884 has expired. If any other authority than the plain language of the act of 1884, above quoted, is necessary to show the right and power of the government of the United States to exercise its control over the title to these lands in so far as the power of Moses and Henry to alienate them is concerned, and ignore the judgment of the superior court of Asotin county purporting to quiet title in appellant, such authority is found in the following cases in the Federal courts wherein such power of the United States was successfully maintained. *United States v. Allen, supra; Bowling v. United States,* 191 Fed. 19; *United States v. Hemmer, supra.* We are of the opinion that the decree of the superior court for Asotin county, purporting to

quiet title in appellant as against Moses and Henry, is void and of no effect, neither as touching the rights of the United States nor those of Moses and Henry, and the superior court of that county correctly so held in this action.

Some contention is made in appellant's behalf that respondents have no right to resist his claimed right to judgment upon these notes for the reason that they have failed to effectually rescind the contract for the purchase of the land by them from appellant. We think this contention is without merit. Their refusal to pay the balance due upon the first note at maturity, and upon the other notes upon appellant's election to declare them due, their refusal to receive the deed tendered to them by the bank in behalf of appellant, their manifest disclaimer of any interest in the land, which we think is deducible from their acts made plain to appellant, all because of the failure of the title of appellant, and, as we think, timely done upon discovery of the failure of appellant's title to the land, are in our opinion sufficient unequivocal acts of rescission on their part. 39 Cyc. 1431.

We conclude that appellant is not entitled to recover upon the notes in this action, and that respondents are entitled to have the notes surrendered and cancelled, as adjudged by the trial court.

The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

BAUSMAN, J., concurs in the result.

[No. 13021. Department One. May 20, 1916.]

HALVER ENGIRBRITSON, *Appellant*, v. TRI-STATE CEDAR COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—METHODS OF WORK—ASSUMPTION OF RISK—OBVIOUS DANGERS. An experienced logger struck by the top of a dead tree that fell when hit by a rolling log, assumes the risk of the method of work adopted in falling a tree horizontally along a hillside and cutting it into logs in that position; since the dangers were as open and apparent to him as to the master.

SAME—INJURIES TO SERVANT—MEDICAL ATTENDANCE—LIABILITY FOR MALPRACTICE. Where an employer without profit to himself employed a physician to furnish medical attendance to the men, $1 per month being deducted from wages to pay hospital fees, he is liable for the malpractice of the physician only in case of failure to exercise reasonable care in the selection of a competent physician.

Appeal from a judgment of the superior court for Spokane county, Wright, J., entered March 22, 1915, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in falling a tree. Affirmed.

O. C. Moore and *R. P. Woodworth*, for appellant.

Cannon & Ferris, for respondent.

MOUNT, J.—Action for personal injuries. On issues joined and trial to the court with a jury, a verdict was returned in favor of the plaintiff. Thereafter the defendant filed a motion for judgment notwithstanding the verdict, and in case of a denial of that motion, for a new trial. The plaintiff also filed a motion for a new trial, claiming that the verdict was insufficient by reason of passion and prejudice on the part of the jury. On considering these motions, the trial court granted the defendant's motion for judgment notwithstanding the verdict, and dismissed the action. The plaintiff has appealed.

[1]Reported in 157 Pac. 677.

The facts are as follows: The appellant was employed by the respondent in logging operations conducted in Idaho. The appellant was a man thirty years of age, and had followed this character of work for four years. He was thoroughly competent to do the work for which he was employed.

At the time of the accident, the appellant and another employee were directed by the foreman in charge of the defendant's logging operations to saw down a tree upon a hillside. This tree was about two feet in diameter at the butt, and about one hundred and ten feet in length. The appellant was directed to fall the tree horizontally along the hillside in order that the logs might be readily rolled onto a near-by skidway, and because to fall it down hill, as was customary, might endanger the lives of men who were employed at that point getting ready to move the camp.

The appellant sawed the tree down, and it fell horizontally with the hill. Part of his duties after falling the tree was to cut it up into sawlogs. While no specific direction was given to cut this tree into sawlogs after it had been felled, that was the understanding, and he proceeded to do the work with his companion. After sawing off five logs, each sixteen feet in length, and when they were working near the top end of the tree and had cut off the sixth log, that log would not separate from the rest of the logs which had been cut off, and the appellant took his axe and tapped the log on the upper side, so that it rolled out from between the other logs, and down the hill. After it had gone about twenty feet, it struck another tree, which happened to be dead at the top. The concussion caused the top of the standing tree to break and fall. The falling top struck the appellant upon the leg, causing his injury. The appellant was then sent to a hospital, where he was treated for some time. He alleges that he was maltreated, and sought damages for the alleged negligence of the defendant in directing the tree to be fallen lengthwise of the hill, and also for malpractice of the physician who treated him.

These are substantially the facts as testified to by the appellant.

We think there can be no doubt that the appellant assumed the risk, because he was fully aware and knew of the dangers incident to falling the tree horizontally along the hillside. He was as fully aware of the danger of rolling a log down the hill as the master could have been.

It is argued by the appellant that the respondent selected an unsafe and improper method of performing the particular work, and thereby created an unsafe place for the performance of the work, and for that reason was negligent. But it is apparent that whatever danger there was in the work was as apparent to the appellant as it was to the respondent. As we have seen, the appellant was experienced in this kind of work. The dangers were open and apparent, and he was as able to determine the conditions which had arisen by reason of his work as the master could have been had the master been present and personally directing what should be done. This case, upon this branch of it, is controlled by the cases of *Fisher v. Stone & Webster Engineering Corp.*, 67 Wash. 176, 120 Pac. 44, and *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840. In the former case we said:

"The foreman was not present when the tree was cut. He had previously directed the plaintiff to fall the tree out of the right of way. The plaintiff undertook to do so without further direction, and did so successfully, although the tree leaned toward the right of way. The plaintiff probably knew where the tree was going to fall, by the way he cut it. He no doubt could see, after it started to fall, where it was going and what tree and brush it would encounter in its fall."

The same is true here. The appellant in this case successfully caused the tree to fall as he was directed to do. He was not injured thereby. The fallen tree lay horizontally along a steep hillside. He proceeded to cut it up into sixteen-foot lengths. It was apparent that, when the tree was cut up into

log lengths, and when these lengths were separated, they would naturally roll down the hill, and in so doing they would encounter stumps and trees. The appellant knew this, and necessarily assumed whatever risk there was in that work.

In the *Anderson* case, *supra*, after quoting the rule that a master is *prima facie* bound to instruct a servant as to all risks which are abnormal or extraordinary, and at the same time of such kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself, we said:

"There can be no doubt but that this rule is correct, but it has no application to the facts of this case. There were no abnormal or extraordinary risks or dangers about the work which the appellant was doing which were not as open and comprehensible to appellant as to respondents. . . . He must have known that, when he cut down a tree one hundred and thirty feet long and one foot in diameter at the base, it might fall upon him, and that such tree was liable to break limbs in its descent against other trees standing near by, and that these limbs would injure him if he stood under them. Under such surroundings, he must appreciate the dangers without being specifically informed thereof. 4 Thompson, Commentaries on Law of Negligence, § 4061.

"Such dangers are necessarily incident to his employment. They are open and obvious to ordinary inspection. They are made by the progress of the work, and the master is not required to stand by and inform him of things which he may see by merely glancing, or using only ordinary care for his own safety. The injury in this case clearly resulted from one of the ordinary and open risks of his employment. He therefore assumed the risk, and the master is not liable."

That rule applies with all its vigor to the facts in this case.

It is equally clear, under the facts, that the master was not liable for the malpractice of the physician, if there was any malpractice. The evidence shows without contradiction that, when the appellant went to work for the respondent, he knew that $1 per month would be deducted from his wages for hospital fees in case of injury or sickness. The respondent

had employed a physician who had a hospital at Sand Point to care for men sick or injured in its employ. The appellant was informed of this, and understood all the conditions. The respondent retained no part of the money deducted from the appellant's wages for hospital fees.

In *Simon v. Hamilton Logging Co.*, 76 Wash. 370, 136 Pac. 361, we said:

"This court had held that a company employing a surgeon for the benefit of its men and without profit to itself, is not liable in any event, but that the measure of its duty is to exercise reasonable care in the selection of a competent surgeon. *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235. Although we are invited to review and distinguish our own cases and to declare the contrary rule, we think the one announced is supported by reason as well as the better authority, and have determined to adhere to it without reopening the discussion."

There is no contention in this case that the respondent did not exercise reasonable care in the selection of a surgeon and hospital. The respondent was, therefore, not liable for malpractice, if there was any. We are satisfied that the trial court should have directed a verdict in favor of the defendant upon the motion of the defendant before the case was submitted to the jury. The judgment notwithstanding the verdict was therefore properly granted.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ., concur.

[No. 13085. Department One. May 20, 1916.]

ELIZABETH IRWIN *et al.*, *Appellants*, v. CORA A. ROGERS *et al.*, *Respondents*.[1]

WILLS—RIGHT TO MAKE—STATUTES. The right to make a will is purely a creature of statute and subject to legislative control.

STATUTES—CONSTRUCTION. When not defined by statute, terms having a well defined meaning at common law will be given that construction.

WILLS—NUNCUPATIVE WILL—TITLE TO REALTY—STATUTES. Real estate cannot pass by a nuncupative will, in view of the definite common law meaning of the term, and the fact that Rem. & Bal. Code, § 1330, authorizing nuncupative wills is taken almost verbatim from the statute of wills (29 Chas. II) which was uniformly construed to exclude real estate; especially in view of the general policy of our law to require all contracts conveying real property to be in writing.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered December 4, 1914, in favor of the defendants, denying the probate of an alleged nuncupative will, after a hearing before the court. Affirmed.

Del Cary Smith, *Wm. E. Richardson*, and *Edmund J. Farley*, for appellants.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondents.

MORRIS, C. J.—The only question presented by this appeal is whether, under our law, a nuncupative will is effective to pass title to real estate. Being solely a question of law, the facts are immaterial. Before noting our statutes, it will clarify our reasoning to first briefly review the history of written and nuncupative wills.

In England, prior to the Norman Conquest, freedom of testamentary disposition over land had been established, except as limited by grant and certain family claims. Following the introduction of the feudal system, the power of aliena-

[1]Reported in 157 Pac. 690.

tion by will soon disappeared, save through the medium of a devise to uses enforced in chancery, except in a few localities where feudal tenures did not prevail. It is hardly possible to speak with certainty as to the formal requirements of such wills. However, it is very unlikely that a writing was necessary. It was not until the passage of 32 Hen. VIII (known as the statute of wills) that real property became devisable at common law by written will. At this time real property could pass only by a will in writing, made with certain prescribed formalities, while personal property could be bequeathed by nuncupation without any formality whatever. With the growth of learning and the progress of letters, the necessity for nuncupative wills ceased to exist. In addition to the lack of necessity, many fraudulent practices grew up in setting forth such wills, and such frauds became so common that nuncupative wills gradually fell into disfavor and were finally considered to be invalid unless made during the last sickness of the testator. Owing to the many frauds and perjuries to which nuncupative wills were subject, the statute of frauds was enacted (29 Chas. II), putting these testaments under very strong restrictions. Under the law as then administered, a nuncupative will was effective to pass only the testator's personal estate, for real estate being the subject of devise only, by force of 34 Hen. VIII, which required the will to be in writing, a nuncupative will was regarded as too informal in character to operate on this class of property. The following citations will give a more complete history of the law of wills. 2 Blackstone, Commentaries, p. 489 *et seq.*; 30 Am. & Eng. Ency. Law (2d ed.), 549, 560, and 561; Gardner, Wills, § 12; 1 Schouler, Wills, Executors and Administrators (5th ed.), § 15.

With this brief resume, we come to our own material statutes, as found in the following sections of Rem. & Bal. Code:

"Section 1319. Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate, real and personal."

"Section 1320. Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

"Section 1330. No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will." (P. C. 409 §§ 25, 29, 49.)

Based upon these statutes, appellants' argument takes something of a wide range, but as we understand it, it may be briefly summarized as follows:

First: The right or power to dispose of property by will is solely a creature of statute. In other words, is a civil and not a natural right.

Second: The term "will" includes both written and nuncupative wills.

Third: That under § 1319, "Every person . . . may by last will devise all his or her estate, real and personal."

Fourth: That the only power to make a will in this state is derived from § 1319.

Fifth: That § 1330, not specifically indicating the character of property to pass by nuncupative will, must necessarily be governed in this respect by § 1319, which expressly provides for the devise of both *real and personal property by will.*

There can be no doubt of the soundness of appellants' first proposition, that the right to make a testamentary disposition of property is purely a creature of statute and within absolute legislative control. *United States v. Perkins*, 163 U. S.

625; *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013. Such is the reasoning and effect of our own decisions. *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027. The second, third and fourth propositions of appellants may also be accepted for the purpose of deciding this case. We now come to the fifth proposition, asserting that, inasmuch as § 1330 does not in express terms designate the character of property which may be disposed of by nuncupation, we are relegated to § 1319, which grants the privilege as to both real and personal property.

In this case, as in all others of statutory interpretation, a cardinal rule in determining the question presented is to ascertain the intent of the legislature. It is a sound rule that, whenever the legislature uses a term without defining it, such term being well known to the common law, and there given a definite meaning, such use will be presumed to have been made in the sense in which it was understood at common law. Put in another way, where terms which were used in the common law are contained in a statute without an explanation of their meaning, or the sense in which they are to be construed, they will receive the construction placed upon them by the common law.

"Where a statute uses a word, which is well known and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense and will be so construed, unless it clearly appears that it was not so intended." 1 Lewis' Sutherland, Statutory Construction (2d ed.), § 398.

This rule of construction is decisive of the question presented. Our nuncupative will statute (Rem. & Bal. Code, § 1330; P. C. 409 § 49) is taken almost verbatim from the English nuncupative will statute (29 Chas. II), which, at the time of the enactment of our statute, had been uniformly construed as to exclude real estate. It is a sound rule that a statute will not be construed in derogation of the common law unless the legislature has clearly expressed such an intention.

Appellants' sole argument is based upon the fact that the legislature did not, in Rem. & Bal. Code, § 1319 (P. C. 409 § 25), add "in writing" after the word "will," saying in their brief:

"Had the legislature of this state said that 'Every person may by last will "in writing" ' instead of saying 'may by last will and testament devise all his or her estate, real and personal' we would be frank to say that the question now presented would be a debatable one."

This contention assumes that, by the mere omission of the words "in writing," the legislature has changed the settled law of nuncupative wills as it has stood for generations. To so hold would be judicial legislation.

Another reason presents itself why real estate cannot pass by nuncupative will, viz.: our statutes relative to the transfer of such property. It has long been the general policy of our law, as expressed in various statutes, to require all contracts conveying real property, or evidencing any interest therein, to be in writing. Rem. & Bal. Code, § 8745 *et seq.* (P. C. 143 § 1). To now hold that real estate can pass by nuncupation would be in effect to engraft an exception to the general rule and change the policy as to conveyances of real estate by devise. Like reasoning is made use of in Texas and Wisconsin in holding that real estate cannot be devised by nuncupative will. *Lewis v. Aylott*, 45 Tex. 190; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *In re Davis' Will*, 103 Wis. 455, 79 N. W. 761. The Texas statutes on wills are in effect the same as ours. Vernon's Sayles' Civil Statutes, § 7855 *et seq.* Other cases throwing much light on the query are: *Maurer v. Reifschneider*, 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912 C. 643; *Prince v. Hazleton*, 20 Johns. (N. Y.) 501; *Smithdeal v. Smith*, 64 N. C. 52; *In re Male's Will*, 49 N. J. Eq. 266, 24 Atl. 370; *Brown v. State*, 87 Wash. 44, 151 Pac. 81.

A diligent search has revealed only one case (*Gillis v. Weller*, 10 Ohio 462) holding a contrary view. Appellants

do not strongly rely on this case, and we limit our discussion of it to a quotation from *Maurer v. Reifschneider, supra:*

"Our attention has not been called to a case from any state, except Ohio, in which it has been held that a nuncupative will is efficacious to pass the title to land. The soundness of that decision is to be doubted, and in that state the statute has since been changed. This court, as well as the courts of this country generally, does not look with favor upon oral testaments."

We are clearly of the opinion that the legislature did not intend to change the common law relative to nuncupative wills, and that until it does so in unmistakable language, real estate cannot be devised under such a will.

The judgment is affirmed.

MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13091. Department Two. May 20, 1916.]

LEE JOHNSON, *Respondent*, v. ARCADIA ORCHARDS COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACT—REMEDIES OF PURCHASER—DEMAND FOR DEED. Under an installment contract for land, entitling the purchaser, after paying one-fourth or more of the price, "at the expiration of five years from the date of the contract," to a deed for a proportionate part of the land, a demand for a proportional deed made two days after the expiration of the five years is in time, as it is approximately at the expiration of the contract.

SAME — REMEDIES OF PURCHASER — CONTRACT — CONSTRUCTION — BREACH—DAMAGES. Under a contract for five acres of land at the agreed price of $2,000, entitling the purchaser, after paying one-fourth or more of the price, to a deed for a proportionate part upon ceasing payments, "except that no fractional part of an acre shall be deeded under this provision," the purchaser, upon breach by the vendor, in refusing to deed one acre after payment of $500 and interest, may elect to recover damages; but being entitled to but one acre, can recover as damages only the agreed upon price therefor, or $400, with interest from the time of ceasing to pay.

[1]Reported in 157 Pac. 685.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 1, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Cullen, Lee & Matthews, for appellant.

Louis A. Dyar, for respondent.

HOLCOMB, J.—These parties entered into a contract in writing on January 20, 1910, by the terms of which appellant agreed to sell, and respondent agreed to buy, a certain described five-acre tract of land for the sum of $2,000. The covenants and conditions of this contract material to this case are as follows: One hundred dollars of the purchase price was acknowledged as received by the vendor, and it was agreed that the balance was to be paid at the rate of $2.50 per acre per month for a period of four years, and five dollars per acre per month during the fifth year, deferred payments to bear interest at five per cent per annum. If the payments of principal and interest were not made when due, the vendor could declare the contract forfeited and the payments made retained by the vendor. Paragraph 9 of the contract is as follows:

"It is further mutually agreed by and between the parties hereto that in the event said second party shall fail to make the payments of principal or interest when due, as herein provided, then the first party may at its option by giving the said second party written notice of thirty days of the said payment or payments due, which notice shall be mailed to the last address known to the first party, in the event said amounts remain unpaid at the expiration of said thirty days, declare this contract forfeited and shall remain in full possession of said lands and premises, together with the appurtenances thereunto belonging, the same as though this contract had never been made, and the payments thereon by the second party shall, by reason of said default, be forfeited as vested and settled rights; *but it is further mutually understood and agreed that if the purchaser shall have paid one-fourth of the purchase price as herein provided, he may at his option cease*

further payment hereunder and be entitled at the expiration of five years from the date hereof to such a proportionate part of the within described tract of land as the amount so paid shall bear to the purchase price and accrued interest thereon, except that no fractional part of an acre shall be deeded under this provision. The selection of such land shall be by first party, and it is understood and agreed that it shall be equal in every respect to the land herein contracted for."

Respondent made payments on the contract aggregating $575 principal, and the interest accruing, which payments ceased on January 3, 1913. Thereafter, on December 29, 1913, appellant gave respondent notice, as provided in paragraph 9 of the contract, that he was delinquent in his payments, and that, unless they were paid in thirty days, the contract would be declared forfeited. No more payments were made by respondent, who, believing himself entitled to one acre of land by virtue of paragraph 9, on January 22, 1915, two days after the time the contract provided that he should be entitled to a deed, demanded from appellant a deed to one acre of land. This demand was refused, and respondent thereupon instituted this action to recover the moneys paid by him on the contract, with interest on each installment from date of payment thereof. Judgment was entered in accordance with the prayer of the complaint, from which this appeal is taken.

The court concluded that the contract was breached by appellant, the vendor, by reason of its neglect and refusal to give respondent a deed to one acre of land as provided in the contract, and that respondent had the right to accept the breach of appellant and to sue at law or in equity for the payments made by him under the contract, together with interest at six per cent on each payment from the date thereof.

I. It is first asserted by appellant that the delay of two days by respondent after the expiration of the contract precludes him from recovery. The contract in that respect, in paragraph 9, provides that, at the expiration of five years from the date of the contract, the respondent shall be entitled

to such proportionate part of the described tract of land as the amount paid shall bear to the purchase price and accrued interest, excepting that no fractional part of an acre shall be deeded under this provision and that the selection of the land shall be by the vendor; and there was no further duty laid upon respondent in any particular. He could not demand a deed before the day of the expiration of the contract; and inasmuch as the contract did not require him to demand it at all, and since, from the fact of respondent having ceased to make payments when he had paid more than one-fourth of the purchase price, it was to be presumed by appellant that he would avail himself of the alternative stipulation in his contract to receive the one acre of land selected by appellant, there was nothing for respondent to do but wait until January 20, 1915, for his deed to one acre. His demand, therefore, two days after the expiration of the contract, was approximately at the expiration of the contract and was sufficiently prompt to require appellant to comply with the condition of its contract. Hence, respondent was entitled to either the one acre of land or to the value thereof. He had the election of suing for specific performance of the alternative contract to convey the one acre of land or to sue in damages for the value.

II. Respondent made his election to sue for his damages, and he brought his action for the entire amount of money that he had paid under the contract, as if he had performed all of the contract by him to be performed so far as permitted, and that appellant had wholly breached or rescinded the contract. That is not the situation. The italicized portion of paragraph 9 constitutes an alternative contract and a separate and divisible contract, resting, however, upon the original consideration. Respondent himself first abandoned the principal contract for the purchase of five acres of land in gross for $2,000 and, having abandoned and ceased to pay the installments due under the contract, appellant was well within its rights under the contract in giving him the

notice of December 29, 1913. The cases relied upon by respondent, and the view taken by the court as to the breach of an entire contract, therefore, do not apply here. The parties measured their rights in their contract thus: There were five acres of land to be sold in gross for $2,000. It is to be assumed that each acre was worth a pro rata part of the $2,000, or $400. But the parties provided that the respondent should pay in one-fourth at least of the purchase price before he would be entitled to one acre, and that he should not be entitled to any excess or fraction of an acre although he should pay more than the one-fourth part of the purchase price. He was permitted to pay in one-fourth the entire purchase price and then to cease paying. If he did this, he should still have one acre of the five acres contracted for. It was this alternative provision that appellant breached. Thus it is seen that respondent contracted to forego the difference between the value of one acre and the amount which he should pay in—one-fourth of $2,000—as a penalty for abandonment or forfeiture. He paid in one-fourth of $2,000 and the interest on it accumulating, and $75 more. But this also he paid voluntarily and at his own peril. If he continued to perform the contract, this would apply on the entire purchase price. If he ceased and fell back on his alternative contract, he forfeited and lost all of the excess over the value of one acre. He was entitled, therefore, only to the sum of $400 in money or damages, being the value of one acre, together with interest thereon at the legal rate from the time of his ceasing to pay, which was January 3, 1913.

The judgment is therefore modified, and a judgment accordingly ordered. Appellant will recover costs in this court.

PARKER, MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 13092. Department Two. May 20, 1916.]

WALTER BARAGER, *Respondent*, v. ARCADIA ORCHARDS COMPANY, *Appellant*.[1]

CORPORATIONS—OFFICERS, AGENTS AND "SERVANTS"—EMPLOYMENT—REMOVAL. Under Rem. & Bal. Code, § 3683, authorizing corporations to appoint "officers, agents and servants," to require security of them, and to "remove them at will," the term "servants" includes an "assistant horticulturist" employed for one year by an "orchards" company, and is not to be restricted to employees in a fiduciary capacity.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 22, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Cullen, Lee & Matthews, for appellant.

F. A. McMaster, for respondent.

PARKER, J.—The plaintiff, Walter Barager, commenced this action in the superior court for Spokane county, seeking recovery of damages which he alleges resulted to him from the breach of an employment contract entered into by him with the defendant, Arcadia Orchards Company, a domestic corporation, before the expiration of his agreed term of employment. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff for the sum of $620, the full amount claimed, from which the defendant has appealed.

Respondent entered into a contract with appellant by the terms of which he was employed as its "assistant horticulturist" for the term of one year, commencing January 1, 1914, and ending December 31, 1914, for which he was to receive a salary of $155 per month. The contract, which was in writing, did not specify the nature of his employment

[1]Reported in 157 Pac. 675.

other than by referring to him as "assistant horticulturist." It appears, however, from the complaint and his own testimony, that his duties were to assist in irrigating, pruning, spraying and cultivating appellant's orchards and in having charge of men under him in the performance of such duties. On September 1, 1914, appellant discharged respondent from its employment and refused to pay him any salary thereafter. This is claimed by respondent to have resulted in his damage, measurable by the amount of his salary during the last four months of his agreed term of employment, for the recovery of which this action was commenced.

It is contended in appellant's behalf that the trial court erred in refusing to render judgment in its favor and dismiss the action with prejudice. This question was raised in the trial court by demurrer to the complaint, by challenging the sufficiency of the evidence at the conclusion of the trial, and by motion for judgment notwithstanding the verdict, made before the rendering of final judgment. It is of no consequence whether we view the problem as one touching the sufficiency of the allegations of the complaint to constitute a cause of action or the sufficiency of the evidence to entitle respondent to recover, the controlling facts being conceded.

Counsel for appellant rest their contention upon § 3683 of Rem. & Bal. Code (P. C. 405 § 23) prescribing the powers of corporations as follows:

"(4) To appoint such *officers*, *agents*, and *servants* as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation;

"(5) To require of *them* such security as may be thought proper for the fulfillment of their duties, and to remove *them* at will. . . ."

We have italicized the words of these two subdivisions of § 3683 which we regard of controlling force here. The only question here for consideration is, then, does this statutory power of removal apply to an employee of a corporation whose duties under his contract of employment are of the nature of

respondent's and who has an express contract with the corporation for a specific term. The above quoted subdivisions of § 3683, viewed apart from our previous decisions and those of other courts, seem to us to so plainly answer the question in appellant's favor as to hardly admit of serious argument to the contrary. In subdivision 4 we find the terms "officers, agents, and servants"; and in subdivision 5 the power "to remove them at will." Manifestly the word "them" refers equally to "officers, agents, and servants" mentioned in subdivision 4. Conceding, for argument's sake, that respondent was not an officer or agent of appellant, it seems to us that he was, in any event, a servant of appellant within the commonly accepted meaning of that term. 35 Cyc. 1480. If the word "servants" as here used means only some employee of a corporation inclusive of the terms "officers" or "agents," then the word "servants" manifestly was used to no purpose. Of course, the word "servants" must be considered of some force as here used, under well recognized rules of statutory construction.

There is, however, in the decision of this court in *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913 B. 667, some observations which may seem not wholly in harmony with this conclusion. In that case, there was involved the employment by the brewing company of Llewellyn as "its attorney and assistant manager," for an agreed term of three years at a salary of $300 per month. It was there held that, notwithstanding the express contract of employment for the specified term, by virtue of the corporate powers prescribed by subdivisions 4 and 5 of § 3683 above quoted, Llewellyn could be removed by the proper authorities of the corporation without rendering the corporation liable for that portion of his salary which would fall due thereafter had his employment continued. It was there suggested as the evident policy of this statute that, if the trustees of the corporation were authorized to appoint "officers,

agents and servants" to positions of responsibility and trust in the management of the corporate affairs and extend their appointments over a period of years and thus deprive the subsequent trustees of the power of removal, they could thus perpetuate any business policy of the corporation even though it be detrimental to the interests of the stockholders, who would be unable to obtain relief therefrom. It is true, the court there observed:

"The expression 'officers, agents, and servants,' used in subdivision 4 of § 3683, *supra*, contemplates employees of a fiduciary character who are to occupy positions of responsibility and trust, as subdivision 5 provides that such security as may be thought proper may be required of them for the fulfillment of their duties."

This observation, we think, may be accounted for as being suggested by the decisions of other courts cited in the opinion, especially the quotation from the Louisiana case on page 322. It is to be noted, however, that the Louisiana case involved the removal of an officer of a corporation under a by-law reading: "The tenure of all officers of this corporation shall be during the pleasure of the majority of the board of directors." No statute or by-law has come to our notice touching the power of removal of employees of a corporation which refers to the employees subject to removal as "officers, agents and *servants*," as our statute does. It seems to us that the policy of the statute suggested by the court in the *Llewellyn* case, being to prevent the trustees of a corporation from binding the corporation to any future fixed course of action or policy so far as the personnel of its employees is concerned, touches the power to remove "servants" "at will," as much as it does the power to remove "officers" or "agents" "at will"; for such is the express language of the statute. So far as the observations of the court in the *Llewellyn* case suggest that the power of removal conferred by this statute does not apply to "servants" other than those of certain superior classes, such as officers and agents, we think such observations must be re-

garded as dictum and not decisive of the question here presented.

Our later decisions in *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 136 Pac. 1158, Ann. Cas. 1915 D. 346, 51 L. R. A. (N. S.) 398, and *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, 153 Pac. 317, are of interest in this connection, but do not decide this exact question.

We conclude that the judgment must be reversed and the action dismissed. It is so ordered.

HOLCOMB, MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 13193. Department One. May 20, 1916.]

MUTUAL INVESTMENT COMPANY, *Appellant*, v. WALTON MACHINE COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS—INSOLVENCY — CHATTEL MORTGAGES — AFFIDAVIT OF GOOD FAITH—CREDITORS—RECEIVERS. Rem. & Bal. Code, § 3660, providing that a chattel mortgage is void as against creditors of the mortgagor or subsequent purchaser, and incumbrancers in good faith, unless accompanied by the affidavit of the mortgagor that it is made without design to hinder, delay or defraud creditors, a chattel mortgage by a corporation without an affidavit of good faith is void as to a receiver for creditors, who was appointed on insolvency and took possession of the mortgaged property before the mortgagee or any person had acquired a valid lien thereon; as the property is a trust fund for creditors in *custodia legis*, and no creditor could thereafter obtain a preference over others.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 3, 1915, dismissing an action to foreclose a chattel mortgage, tried to the court. Affirmed.

A. E. Gallagher, for appellant.

Clyde H. Belknap and *Albert G. Starkey*, for respondents.

MOUNT, J.—This action was brought to foreclose an alleged chattel mortgage against the Walton Machine Company, a corporation, and W. F. Downie, its receiver.

[1]Reported in 157 Pac. 682.

The facts are not in dispute. It appears that, in April, 1910, the Walton Machine Company executed a lease which also contained provisions of a chattel mortgage, in favor of the Mutual Investment Company. It is conceded that this mortgage did not contain the affidavit of good faith required by Rem. & Bal. Code, § 3660 (P. C. 349 § 3). Thereafter the Walton Machine Company became insolvent, and W. F. Downie was appointed receiver and took possession of the property described in the chattel mortgage. After the receiver was appointed, this action was brought to foreclose the chattel mortgage against the maker thereof, and against the receiver. The trial court concluded that the chattel mortgage was void, and denied foreclosure thereof. The plaintiff has appealed.

The question in this case is whether the chattel mortgage, having no affidavit attached to it showing that it was made in good faith, and without any design to hinder, delay, or defraud creditors, is superior to the rights of unsecured creditors of the mortgagor, represented by a receiver appointed for an insolvent corporation.

The appellant relies upon the following cases: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211; *Thomas v. Grote-Rankin Co.*, 75 Wash. 280, 134 Pac. 919; *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483; *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915 D. 300; *Watson v. First Nat. Bank of Clarkston*, 82 Wash. 65, 143 Pac. 451; *Malmo v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569; *Eilers Music House v. Ritner*, 88 Wash. 218, 152 Pac. 1008, 154 Pac. 787.

The statute provides at Rem. & Bal. Code, § 3660 (P. C. 349 § 3):

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless

it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, . . ."

We held in the cases above referred to that the word creditors, as used in this statute, referred to creditors having some specific lien upon the property. This court has held in accordance with the statute that a chattel mortgage, in order to be valid, must be accompanied by an affidavit of good faith in order to attach any lien to the property. *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763; *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515. This is plainly what the statute says. The cases relied upon by the appellant are not cases wherein the rights of creditors of an insolvent corporation were considered. This court has uniformly held that the property of an insolvent corporation in the hands of a receiver is a trust fund for the payment of all of its creditors. *Cook v. Moody*, 18 Wash. 114, 50 Pac. 1020, 63 Am. St. 872; *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444; *Springer v. Ayer*, 50 Wash. 642, 97 Pac. 774.

While we have held, in the cases first above cited, that the word creditors in the chattel mortgage statute refers to creditors having some form of lien against the property, those were cases where the rights of creditors of an insolvent corporation after a receiver was appointed were not considered. It seems too plain for discussion that, after a receiver has been appointed and the property of an insolvent corporation taken into his possession, neither the debtor nor a creditor, after that time, by any act of his, may create a new lien upon the property.

While the receiver takes only the title of the debtor at the time of appointment, and holds no greater interest than the debtor had, yet he takes the property into his custody as an officer of the court, and neither the debtor nor his creditors, after that time, can create or perfect liens which have not

been perfected prior to the time of the receiver's appointment and possession of the debtor's property.

In this case, the chattel mortgage was void under the statute at the time the receiver took possession of the property. The status of the mortgagor and the mortgagee was fixed as of that time. The mortgagor could not thereafter make the affidavit required by the statute; and could not file his mortgage for record so that it would be a lien against the property in the hands of the receiver. When the receiver took possession of the property, his possession was *custodia legis*. And being a trust fund for the payment of all creditors, no creditor could at that time obtain a preference over another. In short, when the receiver was appointed for this particular property, the mortgagee, having a void mortgage, could obtain no preference over other creditors, and is entitled to share in the property only the same as other creditors.

We are therefore satisfied that the trial court properly denied foreclosure of the void mortgage in this case.

The judgment is therefore affirmed.

ELLIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 13357. Department One. May 20, 1916.]

S. KATO, *Respondent*, v. UNION OIL COMPANY, OF CALIFORNIA, *Appellant*, ROBERT T. HODGE, *Defendant*.[1]

APPEAL—PARTIES—BOND—SHERIFF. A sheriff, holding possession of property in dispute by virtue of his office, having no interest in the controversy waged by the other parties to the suit, is not a necessary party who need join with either side or give any bond on appeal.

SAME—APPEAL—LOSS OF RIGHT—CESSATION OF CONTROVERSY—DELIVERY OF PROPERTY. In a controversy for property in the possession of the sheriff, the fact that the sheriff surrendered possession does not work a cessation of the controversy, where the surrender was involuntary and by direction of the court in order to satisfy a prior judgment.

SAME—PARTIES—INTEREST—NOTICE OF APPEAL—CONSOLIDATED ACTION. Failure to serve notice of appeal upon parties to another action consolidated with the present action does not work a dismissal of the appeal, where no notice of the consolidation was given such parties and they did not appear and their interests could not have been affected by the judgment.

Motion to dismiss an appeal from a judgment of the superior court for King county, Smith J., entered November 19, 1915, in an action to recover property held under a levy of execution. Denied.

S. G. Climenson, for appellant.

Robert D. Hamlin, for respondent.

FULLERTON, J.—This is a motion by the respondent to dismiss the appeal, based upon the following grounds:

"(1) The said Robert T. Hodge has failed, neglected and refused to make or file herein a bond for costs on appeal, as provided by law or at all, and has failed, neglected and refused to join in the appeal sought to be taken herein.

"(2) The said Robert T. Hodge, as sheriff, has received into his custody the auto trucks involved in the litigation prior to the perfection of any appeal and acknowledged in

[1]Reported in 157 Pac. 688.

writing full compliance with the judgment sought to be appealed from.

"(3) The said appellant has failed, neglected and refused to serve any notice of appeal in this proceeding upon all of the parties thereto, in that no notice has ever been served or given to S. Masui, plaintiff and Panama Auto Transfer Inc., a corporation, defendant, in cause number 108,034 consolidated with cause number 109,139, or the attorneys of record for said parties.

"(4) The judgment and order of the superior court has been performed by the return of the auto trucks in controversy to the defendant, Robert T. Hodge, as sheriff of King county, and such performance of the said judgment acknowledged in writing."

It is our opinion that the motion is not well taken. The defendant, Hodge, holds the property in dispute by virtue of his office as sheriff of King county, and has no interest in the controversy waged between the other parties. He is thus not required to join with either of them, either on prosecuting or resisting the appeal, and the fact that he has failed to give a bond for costs on the appeal can in no way affect the appellant's rights. Nor does the fact, if it be the fact that the property was returned to him by the appellant after the judgment of the court, have that effect. The judgment so directed in order that it might be sold to satisfy another judgment, the priority of which was one of the questions in controversy in the present action. It was not a voluntary satisfaction of the judgment, but a step which the appellant was coerced to take in aid of an execution on the judgment, since it neither desired to stay the execution nor give a supersedeas bond on the appeal therefrom.

The objection that service of the notice of the appeal was not made on either of the parties to the action consolidated with the present action is of more moment, yet we cannot think the omission fatal to the appeal. No notice of the consolidation was given the parties, nor did they subsequently appear. Seemingly their interests could not be affected,

either by the order of consolidation or by the judgment subsequently entered in the consolidated action. This being so, they are not such parties as the appellant must serve with notice in order to review the judgment in so far as it affects his own rights.

The motion is denied.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13395. Department Two. May 20, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Isabel Rutter, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Walter M. French, Judge, Respondent.*[1]

CERTIORARI—WHEN LIES—INTERLOCUTORY ORDERS—APPEAL—FINAL ORDERS. Certiorari does not lie to review an interlocutory order denying a motion to strike a complaint in intervention, as the same is not reviewable either by appeal or writ of certiorari prior to the rendition of final judgment in the action, under Rem. & Bal. Code, § 1716, limiting the right to appeal from interlocutory orders affecting a substantial right to orders that determine the action or prevent a final judgment therein.

Application filed in the supreme court March 22, 1916, for a writ of certiorari to review an order of the superior court for Spokane county, French, J., entered March 19, 1916, denying a motion to strike a complaint in intervention. Denied.

O. C. Moore and *Merritt, Lantry & Merritt*, for relator.

Edward W. Robertson, for respondent.

PARKER, J.—The relator, Isabel Rutter, seeks, by writ of review, to have this court review and correct the alleged erroneous ruling of the superior court for Spokane county denying her motion to strike the complaint in intervention filed by F. C. Robertson and Fred Miller, as copartners, in an action

[1]Reported in 157 Pac. 684.

pending in that court in which she is plaintiff and her husband, R. L. Rutter, is defendant, in which action she seeks separate maintenance and her husband seeks a divorce. The complaint in intervention was filed by leave of court granted upon the *ex parte* motion of Robertson & Miller, under Rem. & Bal. Code, § 202 (P. C. 81 § 47). Thereafter relator, plaintiff in that action, moved the court to strike the complaint in intervention from the files of that action, resting her motion upon several stated grounds, which are, in substance, that it does not state facts entitling Robertson & Miller to intervene. This motion was denied by the court, and soon thereafter relator applied for a writ of review in this court, upon which an order to show cause was issued. To this order, response and return are made as to a formal writ of review. Counsel for respondent, however, reserve their right to object to a review of the alleged error in the court's ruling in denying the motion to strike the complaint in intervention other than by appeal from the final judgment which may be rendered in that action.

In the recent decision of this court in *Lanigan v. Miles*, 89 Wash. 6, 153 Pac. 1081, we held that an order denying a motion to strike a complaint in intervention was interlocutory only, not finally determinative of the rights of any one; and, since it does not determine the action nor prevent a final judgment therein, it is not reviewable in this court by appeal, except by appeal from the final judgment rendered in the case. After noticing the provisions of § 1716 of Rem. & Bal. Code (P. C. 81 § 1183) limiting the right of appeal to certain specified orders, Chief Justice Morris, speaking for the court, observed:

"Appellant urges that the order complained of affects a 'substantial right in a civil action or proceeding,' and hence, falls within the language of subdivision six. This contention overlooks the plain intendment that affecting a 'substantial right' is not enough, but the order must go further and determine the proceedings, prevent a final judgment or discontinue the action. The order appealed from is not such an

order. The proceedings remain, and the issues are still subject to final judgment, a review of which, on appeal, would determine this or other interlocutory orders. If every ruling of the court which affected a substantial right could be appealed from, the trial of causes would be almost interminable; hence, the statute goes further and demands that such ruling must not only affect a substantial right, but must, in addition, finally determine the proceedings. *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482."

This language is equally applicable to the bringing of questions before this court by writ of review. If parties can by this writ obtain review in this court of alleged errors in the making of interlocutory orders not appealable, then the limitation of the statute upon the right of appeal from orders other than final judgments would be of no practical effect and the evils of reviewing interlocutory orders prior to final judgment would not be prevented. It seems plain to us that the very fact that this order is not appealable prevents our reviewing the alleged error in the making of it, other than by appeal from the final judgment to be rendered in the action.

If the superior court had entered an order finally dismissing the complaint in intervention, there would be reason for arguing that such order in effect determined the action or proceeding and prevented a final judgment therein in so far as the rights of the interveners are concerned, and that this would give such interveners the right of review in this court by appeal, or possibly, in the alternative, by writ of review, if because of the exigencies of the case his right of appeal was not a "plain, speedy and adequate remedy" within the meaning of Rem. & Bal. Code, § 1002 (P. C. 81 § 1729), relating to writs of review. This, however, is not the question before us.

We are of the opinion that the claimed error of the trial court in entering its order denying relator's motion to strike the complaint in intervention is not reviewable in this court, either by writ of review or by appeal, prior to the rendition

of a final judgment in the action. This proceeding is therefore dismissed.

MORRIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 12976. Department Two. May 23, 1916.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Appellant*, v. NATIONAL SURETY COMPANY, *Respondent*.[1]

INSURANCE—FIDELITY INSURANCE—BOND—CONSTRUCTION—ACTIONS—FAILURE OF PROOF. An indemnity bond insuring the fidelity of certain employees named in a schedule is in legal effect a separate bond as to each, and in no sense a blanket bond, where the limit of liability is separately stated at varying sums as to each employee and it is provided that the previously known dishonesty of an employee is a ground of defense, terminates the liability as to subsequent acts, fully earns the premiums paid, and requires the insured to render assistance in bringing the employee to justice; hence an action on the bond for loss by theft must fail where plaintiff is able to prove only that the theft was committed by one or more of three employees, and is unable to show which one was guilty.

Appeal from a judgment of the superior court for King county, French, J., entered July 1, 1915, upon granting a nonsuit, dismissing an action upon a fidelity insurance bond, tried to the court and a jury. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

C. B. White, Skeel & Whitney, and *Wright, Kelleher & Caldwell*, for respondent.

PARKER, J.—The plaintiff, American Savings Bank & Trust Company, seeks recovery upon a fidelity insurance bond given to it by the defendant, National Surety Company. The cause proceeded to trial in the superior court sitting with a jury, when, at the close of the evidence introduced on behalf of the plaintiff, the court, upon motion of counsel for the de-

[1]Reported in 157 Pac. 877.

fendant, granted a nonsuit in its favor and dismissed the action. From this disposition of the case, the plaintiff has appealed to this court.

On November 30, 1912, respondent executed and delivered to appellant the bond sued upon, which, so far as necessary for us to here notice its terms, reads:

"The National Surety Company (Surety) in consideration of the payment of an annual premium computed at an agreed rate, and payable on the 1st day of March, during each and every year that this bond shall continue in force, hereby agrees to make good within sixty days after satisfactory proof thereof to American Savings Bank & Trust Company, Seattle, Wash., employer, any loss which the employer may sustain by reason of any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion or abstraction, on the part of any employee named in the schedule hereto attached, or hereafter added to said schedule by an acceptance notice, executed by the surety, as herein provided, in any position in the employer's service and committed after the 1st day of March, 1913, as to any employee set forth in said schedule, or after the date of such acceptance notice, as to any employee so added to said schedule, and before the termination of this bond, as to any employee covered hereby. The surety's liability hereunder shall, in no event, exceed, on behalf of any one employee, the amount set opposite the name of such employee in said schedule, or said acceptance notices.

"Provided, that the employer shall not have had at the date hereof, or at the date of adding any new employee to said schedule, any knowledge of any of said employees, having been guilty of any act of personal dishonesty in any position in the employer's service, or in the service of any other person, firm or corporation, and shall have notified the surety (at surety's expense) by telegraph and registered letter giving all known particulars, addressed to its Home Office, No. 115 Broadway, New York City, within ten days after becoming aware of any such act or facts indicating such act by any of said employees, or any such loss, and shall have, within ninety days after discovery of any such loss, filed with the surety an itemized statement of such loss, and produced for investigation all books, vouchers and evidence in the employer's possession and rendered every assistance (except pecuniary),

to aid in bringing such employee to justice which the surety may require; . . .

"The liability of the surety hereunder shall immediately terminate as to subsequent acts of any employee, (a) Upon discovery by the employer of any default hereunder by such employee; (b) Any employee leaving the services of the employer; (c) thirty days after receipt by the employer of written notice from the surety of its desire to terminate same, as to any or all of said employees.

"Upon the termination of this bond by discovery of default on the part of any employee, the premium paid as to such employee, shall be deemed fully earned."

The schedule attached to the bond contains the names of appellant's employees, eighteen in number, with the amount set opposite the name of each employee showing the extent of respondent's liability for "any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion or abstraction" on the part of such employee. It appears from the schedule that the limit of respondent's liability as to each of these employees ranges from $1,000 to $10,000.

Appellant alleges in its complaint, in substance, that, while the bond was in force, there was wrongfully converted and abstracted from its funds the sum of $8,500, and that, at the time this sum was so abstracted, three certain employees of appellant named in the complaint, whose names appear in the schedule attached to the bond, and no others, had access to the funds from which the $8,500 was so taken. It is not alleged in the complaint as to which one of appellant's employees took the money; nor is it alleged, except possibly inferentially, that the money was taken by any of the three employees who had access to appellant's funds. In other words, there is no direct allegation in the complaint as to who abstracted this money from appellant's funds. The complaint was demurred to by counsel for respondent, which demurrer was by the court overruled, and thereafter an answer was filed tendering issue upon the facts.

We may assume that, upon the trial, the evidence introduced in appellant's behalf tended to show that one or the other of two of appellant's employees who had access to its funds took therefrom the $8,500 in question. This evidence, however, went no farther than to show that these two employees had equal means of access to the particular funds from which the money was taken. We think the evidence shows without contradiction that a third employee also had equal means of access to these funds, though we put that aside for the purpose of argument, in order to follow more closely the argument of counsel for appellant. No claim is made by counsel for appellant that the evidence shows, or tends to show, which one of these employees took the money, but their argument proceeds apparently upon the theory that it is enough that the evidence tends to show that one or the other of these two, or at the most three, employees took the money without tending to show which one took it. As said in their brief:

"Whatever may be the individual opinion of the representatives of the plaintiff as to whose wrongful act is responsible for the loss of this money, we are not called upon for an expression, because we are insured against the act of both of them. But we do say this in all candor: That when money disappears from a safe to which two men and only two have the combination, some explanation is required; and human nature is so constituted that in the absence of some explanation the conclusion will be drawn that one or the other misappropriated the money."

So we have the same condition shown in the evidence as is shown by the allegations of the complaint, to wit, that some one of several employees, without any showing as to which one, abstracted this $8,500 from appellant's funds. Indeed, appellant seems to have studiously avoided charging its loss to the dishonesty of any particular employee.

Now if appellant had been indemnified against the dishonesty of each of its eighteen employees by a separate writ-

ing, instead of by a single writing, referring to each employee and specifying separately the amount of respondent's liability for the dishonesty of such employee, as this bond plainly does, an action upon such a writing could not be successfully maintained by allegations and proof which pointed with no greater certainty to the dishonesty of such employee than the allegations and proof in this case point to the dishonesty of some single employee. The complaint, as well as the evidence, in such case would be insufficient to sustain a cause of action.

We are constrained to hold that this writing is, in legal effect, a separate bond as to each of the eighteen employees named in the schedule attached thereto, and that it is in no legal sense a blanket bond. Let us notice some of its provisions so indicating. We have noticed that the schedule attached to the bond shows that the limit of respondent's liability for the dishonesty of each of its eighteen employees is stated separately as to each employee. It so happens that the limit of respondent's liability for the dishonesty of the three employees who had access to the particular funds from which the $8,500 were abstracted is $10,000 as to each, but that is a coincidence of no consequence so far as our present problem is concerned. The fact that the limit of respondent's liability growing out of the acts of dishonesty of each of the whole eighteen employees is separately stated and fixed at a specified sum points, it seems to us, unerringly to the separateness of respondent's liability as to each employee named in the schedule. Manifestly the stating in the schedule of these separate limits of liability would have been to no purpose whatever had the bond been intended as a mere blanket insurance against loss through the dishonesty of appellant's employees. No name of any employee is in the body of the bond, but we read there that:

"The surety's liability hereunder shall, in no event, exceed, on behalf of any one employee, the amount set opposite the name of such employee in said schedule, or said acceptance notice."

We read in the body of the bond the following:

"Provided, that the employer shall not have had at the time hereof, or at the date of adding any new employee to said schedule, any knowledge of any of said employees, having been guilty of any act of personal dishonesty in any position in the employer's service, or in the service of any other person, firm or corporation."

This provision plainly gives to respondent the right to defend upon the ground of the previously known dishonesty of an employee on the part of appellant. Manifestly respondent could not avail itself of any such defense unless appellant proceeded in the prosecution of its action by allegations and proof upon the theory that some named one of its employees, for the dishonesty of which respondent was liable, had committed the claimed act of dishonesty resulting in appellant's loss and respondent's liability.

It is also provided in the body of the bond that appellant shall have "rendered every assistance (except pecuniary) to aid in bringing such employee to justice which the surety may require." The words "such employee" manifestly refer to some particular employee whose act of dishonesty has rendered respondent liable under the bond. This condition of the bond would be of no value to respondent unless the claim of dishonesty of an employee made by appellant referred to some named employee for whose dishonesty respondent is liable under the bond.

We also read in the body of the bond the following:

"The liability of the surety hereunder shall immediately terminate as to subsequent acts of any employee. (a) Upon the discovery by the employer of any default thereunder by such employee. . . .

"Upon the termination of this bond by discovery of default on the part of any employee, the premium paid as to such employee, shall be deemed fully earned."

Now suppose that this case had been permitted to go to the jury and a verdict had been returned against respondent. As to which one of these two or three employees having access

to the particular funds from which the $8,500 was abstracted would respondent's liability under the bond cease as to subsequent acts of such employee? Manifestly the verdict would furnish no answer to this question. It seems to us that respondent has the right under the terms of the bond to have its liability determined in such manner as to answer this question. We cannot escape the conclusion that this bond is, in legal effect, a separate bond as to each employee named in the schedule attached thereto.

We conclude that both the complaint and the proof offered in support of the allegations thereof are wholly insufficient to support any cause of action against respondent in this case, because of the fact that, as we view it, this is in law a separate bond as to each employee named in the schedule attached thereto, and no employee has been named, either in the complaint or proof, with any degree of certainty, whose dishonesty is the result of appellant's claimed loss.

The judgment is affirmed.

MOUNT, MAIN, and HOLCOMB, JJ., concur.

MORRIS, C. J., took no part.

[No. 12971. Department Two. May 31, 1916.]

MICHAEL TONER, *as Sheriff, Respondent*, v. R. G. PAGE *et al.*, *Appellants*.[1]

EXECUTION — RETURN — CORRECTION — REMEDIES OF SHERIFF. A sheriff cannot maintain a civil action to correct his erroneous return on execution, which showed he had received a larger sum than the actual amount, his remedy being by motion in the original cause; nor can such action be treated as the equivalent of a motion.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered April 13, 1915, in favor of the plaintiff, in an action to reform a sheriff's return on execution sale, tried to the court. Reversed.

Driscoll & Leonard, for appellants.

Sharpstein, Pedigo, Smith & Sharpstein, J. G. Thomas, and *W. A. Toner*, for respondent.

BAUSMAN, J.—Suit by a sheriff to correct his return which, he says, erroneously stated his having received on execution sale a much larger sum than the actual amount. The sale had long since been confirmed in the greater sum and the sheriff was already sued by an assignee of the judgment debtor in another court for the surplus. The present suit is a formal civil action with many defendants, yet what is sought by the complaint and awarded by the decree is not the setting aside of the sale, but a mere correction of the stated amount.

The sheriff has chosen the wrong procedure. His remedy is by motion in the original cause, where courts have ample power on proper showing to do justice in this respect to their own officers. 11 Cyc. 1374; 3 Freeman, Executions, § 358 *et seq.* For this relief we know of no civil action. The formal, expensive machinery of suit is not to be set in motion every time an officer of court seeks to correct the lan-

[1]Reported in 157 Pac. 866.

guage of his return on summons, attachment, writs, or executions. Nor can we treat formal action as the equivalent of application in the original cause, for such procedure would undoubtedly expose other parties to questions of *res adjudicata* in such suits as they may have begun upon the existing record. Here it is noticeable that the plaintiff, while he attempts to get the benefits of the full procedure of the superior court, at the same time denies to defendant the right to counterclaim, arguing that this is no ordinary action. Neither does he conceive himself subject to statutes of limitation applicable to civil suits.

The objection of appellants to the jurisdiction of the superior court is sustained, and the cause is reversed with orders that the action be dismissed without prejudice to either party.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 12718. Department One. June 1, 1916.]

MARION SMITH *et al.*, *Respondents*, v. C. A. DOTY *et al.*, *Appellants*, C. A. DOTY *et al.*, *Defendants*.[1]

FRAUD—MONEY RECEIVED—PAYMENT OF DEBT—FRAUD UPON CREDITORS—EVIDENCE—SUFFICIENCY. In an action to trace and recover funds placed by judgment debtors beyond the reach of creditors, findings that the debtors made payments and assigned stock without consideration in fraud of creditors are not sustained, where plaintiffs were obliged to depend upon the testimony of the defendants, which tended to show a consideration in the settlement of past debts and there was no evidence of bad faith except from the inferences arising from the relationship of the parties, and the assignee of the stock purchased in good faith without notice of the fraud; as clear and convincing evidence of the fraud is necessary.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered March 8, 1915, upon findings in favor of the plaintiffs, in an action for money had and received, tried to the court. Reversed.

[1]Reported in 157 Pac. 881.

Hayden, Langhorne & Metzger, for appellants.

B. L. Hubbell and *Richard Sleight*, for respondents.

FULLERTON, J.—On April 22, 1910, the Northern Pacific Railway Company instituted proceedings in the superior court of Cowlitz county to condemn for railway purposes certain lands situated in that county. Among the parties made defendant to the proceedings, were the respondents in the present action and the Gruber Lumber Company. The proceedings resulted in an order allowing a condemnation and appropriation of the lands on the payment into court for the owners of the sum of $25,000. This sum the railway company paid into court as directed, and a decree of condemnation and appropriation was duly entered. After the money had been so paid, it was claimed by the respondents on the one side and by the Gruber Lumber Company on the other. Issues were framed between the parties and the right to the money tried out, resulting in a finding by the trial court that the money rightfully belonged to the Gruber Lumber Company, and in an order directing that the money be paid over to it. An appeal was taken from the order to this court, where it was reversed, and the cause remanded with instructions directing the money to be paid to the present respondents as the heirs of L. P. Smith, deceased. *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

Prior to the appeal, no stay of the order having been given, the money was paid to the Gruber Lumber Company, and on the reversal of the order, the respondents were awarded, in lieu of the money, a judgment against the Gruber Lumber Company for the amount thereof. *State ex rel. Smith v. Superior Court*, 71 Wash. 354, 128 Pac. 648.

On the receipt of the money by the Gruber Lumber Company, the trustees of that company met and applied some $3,000 of the money to the payment of the debts of the company, and divided the remainder among the stockholders of the company in proportion to their respective holdings; one

J. M. Keen receiving $2,200, one W. W. Emery receiving $8,200, and one Martin J. Gruber $11,550. In garnishee proceedings instituted by the respondents against the stockholders named, subsequent to the distribution of the money, judgments were recovered against them severally for the amounts which they had each received. These judgments were affirmed by this court in *Smith v. Gruber Lumber Co.*, 81 Wash. 111, 142 Pac. 493.

An execution against the judgment debtors having failed to disclose any property subject to be sold in satisfaction of the judgments, the respondents instituted the present action against the judgment debtors, the Gruber Lumber Company, C. L. Doty, Joseph O'Neill and J. L. Gruber, in an effort to further trace the property. The trial court, from the evidence adduced at the trial, made the following findings of fact:

"(4) That immediately upon receipt of said sum of $25,000 by said Gruber Lumber Company from said superior court, on the 12th day of January, 1911, said defendants W. W. Emery and M. J. Gruber, acting as the board of trustees of said Gruber Lumber Company, within the time allowed by law for plaintiffs to appeal from said judgment of said superior court, and with the intent to place said sum of money beyond the reach of these plaintiffs and beyond the jurisdiction of the superior court, divided said sum of money among themselves, paying $2,200 thereof to defendant J. M. Keen, $8,250 to defendant W. W. Emery and $11,550 to defendant M. J. Gruber.

"(5) That in April, 1907, defendant M. J. Gruber was indebted to his father, defendant J. L. Gruber, in the sum of $2,700 and no more, and in April, 1909, defendant M. J. Gruber was indebted to the Coffman-Dobson Company bank in the sum of $950.

"(6) That in April, 1909, the amount of $950 owing to the Coffman-Dobson bank by defendant M. J. Gruber was included in a note for $8,754.74 given to said bank by defendant J. L. Gruber. From time to time thereafter defendant J. L. Gruber made payments on this note, and in Janu-

ary, 1911, there was a balance due on this note of $3,308.99, which balance defendant M. J. Gruber then paid.

"(7) That previous to the payment of said balance to said bank, defendant M. J. Gruber was actually indebted to defendant J. L. Gruber in the sum of $4,593, which included the $2,700 owing in 1907, the $950 owing the Coffman-Dobson bank in 1909, and the interest thereon at the rate the same was paid to said bank. After paying the balance of $3,308.99 to said bank in January, 1911, M. J. Gruber was still indebted to his father, J. L. Gruber, in the sum of $1,284 and no more.

"(8) That said payment of $3,308.99 made to said bank by defendant M. J. Gruber was from the sum of $11,550 taken by said M. J. Gruber as his share of the money belonging to plaintiffs herein. That in addition thereto the said M. J. Gruber, in January, 1911, under pretense of payment of indebtedness due his father, J. L. Gruber, at the request of the said J. L. Gruber, paid to defendant C. A. Doty the sum of $5,000, and at or about the same time the said M. J. Gruber paid directly to J. L. Gruber the further sum of $1,900, aggregating the sum of $6,900 paid to or on the direction of said J. L. Gruber, whereas in fact there was then owing by M. J. Gruber to J. L. Gruber but the sum of $1,284, and that M. J. Gruber thereby turned over to his father, J. L. Gruber, $5,616 in excess of what he was owing him; that this was done for the purpose of placing said money beyond the reach of plaintiffs herein.

"(9) That said payments were made within the time allowed by law for plaintiffs herein to appeal from the decision of the said superior court, and were made and received with intent to place said money beyond the reach of these plaintiffs, and that the said M. J. Gruber is now and was at said time insolvent.

"(10) That defendant W. W. Emery, from the sum of $8,250 received as his share of the $25,000 divided as hereinbefore set forth, purchased stock of the Emery-Nelson Company, a corporation in which defendant C. A. Doty was the principal stockholder, of the par value of $5,000, and paid therefor the sum of $5,000; that in order to place said stock beyond the reach of plaintiffs, on or about the 17th day of April, 1912, immediately upon the reversal by the supreme court of the judgment of the superior court awarding the

said sum of $25,000 to the Gruber Lumber Company, as said reversal is hereinafter set forth, defendant W. W. Emery assigned said stock to defendant C. A. Doty; that said assignment was without consideration and was accepted by the said C. A. Doty with intent to place said stock beyond the reach of these plaintiffs; that said stock was of the value of $1,250 at the time of said assignment; that defendant W. W. Emery was then and is now insolvent."

Judgment was entered against J. L. Gruber and C. L. Doty according to the findings, and this appeal is prosecuted therefrom.

Certain preliminary questions going to the right of the respondents to prosecute the action in the form adopted are suggested by the appellants. These, however, we do not find to be fatal to the proceedings and, owing to the conclusions we have reached on the merits of the controversy, will not be further noticed.

The respondents found it necessary to rest their case as to the facts not of record on the testimony of their opponents. The evidence on which the judgment against J. L. Gruber is based is found in that given by himself and by Martin J. Gruber. In substance it is this: J. L. Gruber and Martin J. Gruber bore the relationship of father and son. In 1907, Martin J. Gruber joined with W. W. Emery and others in the incorporation of the Gruber Lumber Company, subscribing for eighty shares of its capital stock, which had a par value of $100 each. To obtain means to make his initial payment on his stock subscription, he, together with his father, gave a note to Coffman, Dobson & Company, bankers, doing business at Chehalis, Washington, for $12,500. Of this sum Martin took to his own use $6,000, and his father the remainder. From time to time after the execution of the note, J. L. Gruber paid principal and interest thereon aggregating something more than $7,000, and more than his share of the obligation. Martin made no payments on the obligation at all. In the meantime, he, together with W. W. Emery, had executed additional notes to the bank for money borrowed

which his father had signed as surety. On the day last named, the total of the indebtedness, that is, the amount owing by Martin on the original note of $12,500, and the amount owing on the notes executed by himself and Emery on which his father was surety, aggregated $8,754.74. For this sum a new note, payable on demand, was given Coffman, Dobson & Company, signed by the three persons named. It was testified by Martin that Emery's obligation to the banking house was about $1,000, being one-half of two notes aggregating $1,950 on which some interest had accumulated; and both Martin and his father testify that the remainder of the obligation was wholly the obligation of Martin, the father having satisfied all that was justly due from him by his payments on the original note. Both Martin and the father testify also that the father had, prior thereto, made other advancements to Martin, one of which at least was of considerable magnitude (some $2,700 used for the purchase of a sawmill), and that the father had agreed to forgive the indebtedness to Martin if he would pay the obligation last given the banking house.

The requirements of the lumber company seemingly exhausted its earnings, and neither Martin nor Emery made any payment on the note prior to the receipt of the money paid by the railroad company in the condemnation proceedings. The father, however, at the demand of the bank, had made numerous payments thereon. These aggregated, at the time last mentioned, the sum of $6,251.66, leaving a balance due of $3,308.99. After the receipt of the share assigned him of the money paid in the condemnation proceedings, Martin forthwith paid to the banking house of Coffman, Dobson & Company the balance due upon the note, and paid to C. A. Doty, at the request of his father, the sum of $5,000, for which Doty gave to the father his written obligation. Shortly thereafter, M. J. Gruber paid directly to his father, on a settlement had between them, some $1,250, the precise sum

neither remembered with exactness, although both testify that it was not more than was due the father for the sums he had paid on the note of $8,754.74 given the banking house of Coffman, Dobson & Company, after deducting the $5,000 advanced to Doty.

After payment of the last named note to the bank, Martin J. Gruber collected from W. W. Emery his share thereof, estimated at $1,000, and this sum, together with the balance of the money he received in the division of the proceeds of the condemnation proceedings, he appropriated to his own use.

The judgment of the court with reference to the stock transaction is founded principally on the testimony of W. W. Emery. Mr. Emery testified that, on the receipt of the money paid over to him as his share of the money received in the condemnation proceedings, he, together with the appellant C. A. Doty and one Herman Nelson, organized and incorporated the Emery-Nelson Lumber Company, which was capitalized at $150,000, the capital stock being divided into 1,500 shares of the par value of $100 each. The incorporators subscribed for the stock in equal shares, and each paid into the concern $5,000 and received an issuance of stock at its par value to that amount. The corporation, after its organization, took over a lumber plant owned by one Hamilton Pitcher and assumed an indebtedness thereon of $150,000. Later on, probably in June or July of 1912, Emery traded his stock to the appellant Doty, receiving as a consideration therefor a tract of land containing between three and four acres on which was situated a dwelling house of the value of about $1,000. Emery testified further that he was without means to pay the balance of his subscription to the capital stock of the Emery-Nelson Lumber Company, and that the stock which had been issued to him and which he had traded to Doty was worth at that time probably twenty-five cents on the dollar.

It was further shown that C. A. Doty and W. W. Emery were sons-in-law of the appellant J. L. Gruber, and that the social and domestic relations existing between their several families "were extremely cordial and intimate." It was shown, furthermore, that at some time prior to the incorporation of the Gruber Lumber Company, the father acquired two certain tracts of land for which he took title in the name of the son, and that these were transferred to purchasers subsequent to the time the appeal was taken from the order of the trial court awarding to the Gruber Lumber Company the moneys paid by the railway company in the condemnation proceedings, although prior to the decision of this court reversing that order, the proceeds of which were taken by the father. It appears from the testimony, also, that the father is a man of means, that he has always taken a keen interest in the welfare of the different members of his family, and that he has from time to time made advancements in money to their use for which he has exacted no very strict accountings.

It is our conclusion that the evidence furnishes no justification for the findings and judgment of the trial court. The figures adopted by the court with relation to the transaction between father and son are purely arbitrary. There is nothing in the record from which the several amounts found to be owing at the different times mentioned in the findings can be deduced. Under the evidence, the note of $8,754.74, given to the banking house of Coffman, Dobson & Company, was either the note of Martin J. Gruber, as the parties testified it to be, or it was the joint note of the three persons who signed it, as the law, in the absence of a showing to the contrary, will presume it to be. Either conclusion requires a different judgment from that entered by the court. If the note was the obligation of the father, the payments of the son thereon and to the father on account thereof were wholly voluntary, and a much larger judgment should have been entered against the father. If the note was the obligation of the three persons who executed it, the judgment against

the father is too large, as the difference between the amount he actually paid on the note and the sum he would then have been obligated to pay, deducted from the amount the son paid to him, would not equal the amount of the judgment.

Nor can we think that the evidence justified the conclusion that the settlement between the father and son was not made in good faith. It will be remembered that the settlement was made and the money paid over immediately after the trial court had decided that the money paid in the condemnation proceedings was the money of the Gruber Lumber Company, and before any appeal had been taken therefrom. The only evidence in the record on the question at all, aside from the inferences arising from the relationship of the parties, is the inference of bad faith that arises from the fact that the parties knew the order was an appealable order and may have anticipated an appeal therefrom and a reversal of the order in the appellate court. But fraud must be proven by clear and convincing evidence, and any inference that might arise from these circumstances we cannot think amounts to the dignity of such proof.

It may be well here to say that the parties conceded in the court below that "if Martin J. Gruber was justly indebted to his father in the amount claimed on January 12, 1911, and that the payment thereof was made in good faith . . . then a recovery cannot be had in this case," and that no different contention is made in this court.

Nor does the finding concerning the transfer of the stock by Emery to Doty have any better foundation. There was no material difference between the values of the property exchanged, nor did the exchange enable Emery to place his property beyond the reach of the respondents. But more than this, it was not shown that the respondent Doty participated in the original transaction in any manner, or that he even knew of the liability of Emery to account to the respondents for the money which he used in the purchase of the stock. The exchange being in good faith on his part,

he cannot be compelled to surrender the property received by him to the respondents and look for reimbursement from Emery. To recover the stock from him, knowledge on his part of the fact that the property was procured in fraud by Emery must be shown.

The foregoing considerations lead to the conclusion that the judgment appealed from must be reversed and the cause remanded with instructions to enter a judgment in favor of the appellants. It is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 12722. Department One. June 1, 1916.]

LOTTIE B. ALGOE, *Appellant*, v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, *Respondent*.[1]

INSURANCE—LIFE INSURANCE—LAPSE—AUTOMATIC EXTENSION—RESERVE—APPLICATION—LOAN. Under a policy of life insurance providing that, after it had been in force three full years, should it lapse, the full amount of the policy at date of lapse, after payment of indebtedness, will be extended without request or demand therefor as nonparticipating term insurance, the insured when he could not pay the premiums had a right to rely upon the reserve fund for automatic extension of his insurance for such time as the surplus would buy; and when, at the time of his death, the insurer had in its hands a reserve to the credit of the insured sufficient to repay a loan and purchase the full amount of nonparticipating term insurance upon the life of the insured to that time, such term insurance was in full force.

SAME—EXTENSION—CONDITION PRECEDENT—LOAN PROVISIONS—APPLICATION OF RESERVE. In such a case, where the insured had obtained a loan, repayment of the loan is not a condition precedent to the right to set off against his loan the reserve value of the policy and have the remainder applied to the purchase of extended insurance, in view of the loan provision of the policy which declared that "any indebtedness . . . shall be first deducted in any settlement of this policy," which negatives the idea of such condition precedent.

SAME—LOAN—INDEBTEDNESS—RESERVE. In such a case, the rights being fixed as of the date of the death, there is no indebtedness due

[1]Reported in 157 Pac. 993.

from the insured at the date of the lapse where there is a reserve to his credit sufficient to meet it.

SAME—POLICY—CONSTRUCTION. An ambiguous or complex clause in an insurance policy difficult for a layman to understand is to be construed in favor of the insured.

SAME—LIFE INSURANCE—FORFEITURE—EXTENSION—LOAN PROVISION. The insurance company does not have the right to forfeit extended insurance after the death of the insured, under a loan clause providing that, upon any default in premium or interest, the company may terminate the policy and obtain the amount due by deducting the same from the reserve and apply the overplus if any as a single premium of fully paid life insurance; as this was intended only as a means of foreclosing the lien by cancellation prior to a loss, and not as a forfeiture of a liability vested and accrued by the death of the insured.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered January 21, 1915, in favor of the defendant, in an action on a life insurance policy, tried to the court upon an agreed statement of facts. Reversed.

Zent, Powell & Redfield, for appellant.

Winfield R. Smith, for respondent.

ELLIS, J.—Action to recover on a $5,000 twenty-year life insurance policy. The case was tried on a statement of agreed facts. The policy was issued on February 15, 1902, to Otis Lee Algoe, payable to the plaintiff, his wife. The annual premium was $217.50, payable on February 15. All premiums up to and including that falling due February 15, 1913, were paid. On January 28, 1913, the insured obtained a loan of $1,477 from defendant upon the policy, executing at the time a loan contract and delivering the policy to defendant, in whose possession it still is. The annual premium on the policy and the annual interest in advance on the loan, both of which fell due on February 15, 1914, were never paid. The insured died April 15, 1914. Defendant was immediately notified of that fact. The reserve value of the policy at that time was $1,640.80. There was also an unpaid dividend of $84.75. Defendant thereafter applied this reserve value in

payment of its loan of $1,477, and entered the remaining $163.80 of the reserve as payment in full for $270 of paid up nonparticipating insurance upon the life of the insured at his then age. No policy was issued, but defendant admits that this $270 is owing to plaintiff. That sum was tendered before commencement of this action but was refused. The court found that the $270 had been deposited in the registry of the court and so remained, and entered judgment for plaintiff in that sum less the sum of $18 costs. Plaintiff appeals.

Stated in their natural order, appellant's contentions are (1) that the policy was by its terms in force for the full sum of $5,000 at the time of the death of the insured; (2) that the insurer, in any event, waived the default in payment of the premium. If the first claim is correct, the second need not be considered.

The first claim must be determined from the terms of the contract of insurance and the terms of the loan contract. This involves the construction of the application (referred to in and made a part of the policy), the policy itself and the loan agreement. The application provides:

"That such policy shall lapse and be void if any premium or installment thereon is not paid as therein provided, and that then all previous payments shall be forfeited to the company, except as therein otherwise provided;"

Among the conditions of the policy are the following:

"*Incontestability.* This policy shall be indisputable, after two years from its date of issue, for the amount due, provided the premiums are duly paid. . . .

"*Loans.* After premiums have been paid upon this policy for not less than three full years, the party having the right of surrender hereunder may borrow upon it, in accordance with the rules and regulations of the company, seventy-five per cent of its cash value at the time the loan is requested. Any indebtedness to the company, from the insured, beneficiary or assignee, shall first be deducted in any settlement of this policy.

"*Values and Additions.* If all the annual dividends apportioned to this policy are used for the purchase of additional

insurance thereto, then and in that case the values, respectively, of this policy shall be not less than stipulated in the 'Schedule of Policy Values' below; Provided, that in event of termination by 'surrender value' under said schedule, this policy shall be duly surrendered to the company while in force, or within three months of its date of lapse, and that all indebtedness above mentioned shall first be repaid."

Then follow schedules of policy values and surrender values and further provisions as follows:

"If any dividend is withdrawn or used in reduction of premium payment, this policy will nevertheless be entitled to one of the following values: (1) After payment of premiums for three full years, if duly surrendered to the company while in force or within three months of its date of lapse, any indebtedness being then repaid, to full paid nonparticipating life insurance in amount equal to as many twentieth parts of the principal sum of this policy as there have been full annual premiums paid hereon, together with any existing additions by dividend; . . .

"*Extension Condition.* After this policy has been in force three full years, should it lapse and not be surrendered as provided above, the full amount of the policy at date of lapse, any indebtedness being repaid within three months thereafter, will be extended, without request or demand therefor, as nonparticipating term insurance, but only for the period specified in the 'Schedule of Extended Insurance' following: Provided, that the said term insurance shall be based upon completed insurance years only, and that if the insured dies within three years from such lapse, all unpaid premiums, with interest at six per cent per annum, shall be deducted from the amount insured."

It is a stipulated fact that:

"The net value of the said policy above indebtedness was sufficient so that if applied at or after February 15, 1914, to the purchase of $5,000 of nonparticipating term insurance upon the life of the insured the said term insurance would have been in force at and beyond the time of his death."

It seems to be conceded that, under the provisions of the policy proper, the first condition above quoted and the appli-

cation, the policy automatically lapsed thirty days after a failure of the insured to pay any premium when due (subject to the provisions for realization of surrender value by surrender of the policy, "all indebtedness being first repaid" within three months after such lapse), unless the policy for the full sum of $5,000 was automatically kept alive by the "extension condition" last above quoted.

The appellant argues that, inasmuch as there was a reserve value in excess of the loan sufficient to carry the policy beyond the death of the insured, the policy was automatically extended for the full amount. This is based upon the fact that extension is to be made "without request or demand."

The respondent contends that the payment of the loan was a condition precedent to the right to extended insurance, because of the last provision of the extension condition that "if the insured dies within three years from such lapse, all unpaid premiums, with interest at six per cent per annum, shall be deducted from the amount insured." That because of this provision the insured had no right to set off against his loan the reserve value of his policy and have the remainder applied to the purchase of extended insurance. There would be some force in this claim were this the only thing in the policy touching the subject, but the loan provision of the policy itself, which we have quoted, declares that "any indebtedness to the company, from the insured, beneficiary or assignee, shall first be deducted in any settlement of this policy." This negatives the idea that the payment of the loan is a condition precedent to the assertion of any other rights of the insured or beneficiary under the policy. This loan provision of the policy is the basis of the right to demand a loan on the one hand, and the right to take a pledge of the policy to secure the loan on the other. It must, therefore, be read into the loan agreement as one of its terms. The status of the policy and the rights of the parties thereunder became fixed as of the date of the death of the assured. Among those rights was the right of the beneficiary to extended in-

surance, a right not forfeitable for nonpayment of premiums. At that time there stood to the credit of the assured, which of course survived to the credit of the beneficiary, a reserve value in the sum of $1,640.80. This is conceded. The policy not having been surrendered and its cash value collected nor converted into paid up nonparticipating term insurance, as provided in the condition as to "values and additions" above quoted, there can be no doubt that had there been no loan the whole of this reserve would have been automatically applied in extending the insurance for the full face of the policy. This must be, and is, conceded. This automatic extension being expressly declared to attach "without request or demand therefor," would have attached as a fixed right immediately on the lapse of the policy for nonpayment of premiums without surrender of the policy. The question is thus reduced to this: Was there any indebtedness due from the insured to the insurer at the date of the lapse? Technically, yes, but there was a reserve to his credit sufficient to meet it. As said by another court in answer to the same claim as that of respondent here:

"As it seems to us, there was no indebtedness due from the insured to the insurer when the policy lapsed on October 26, 1907, but on the contrary the company was, after deducting the indebtedness of the insured to it, due the insured a balance of $42.22, an amount sufficient to purchase an extended insurance for a period beyond his death, and he had not applied for paid-up insurance for the amount of this balance; and that by the very terms of the contract between the parties the insured had the right to rely, as doubtless he did, upon the provision contained in clause second of his policy, that he should be entitled to have the balance to his credit with the insurer applied to the purchase of extended insurance, unless he demanded paid-up insurance and surrendered his policy." *Stratton's Adm'r v. New York Life Ins. Co.*, 115 Va. 257, 78 S. E. 636.

So here the insurer had in its hands a reserve of $1,640.80 to the credit of the insured. The three months after lapse within which the loan might be paid and the insurance auto-

matically extended had not expired. The insurer could no more refuse to apply this in payment of the loan and apply the surplus to extended insurance than it could have refused a tender of the amount of the loan from any other funds of the insured and so avoid the automatic extension. This follows from the specific direction in the loan provision of the policy that any indebtedness shall be deducted in any settlement of the policy. "Any other construction would be a 'snare to the unwary'." *Stark v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 574, 159 S. W. 758. By the very terms of the policy the insured, when he found he could not pay the premium, had the right to rely upon this course and the consequent automatic extension of his insurance for the full amount and for such time as the surplus would pay for. While the surrender of the policy and the payment of premiums within three months after lapse may be regarded as a condition precedent to the right to demand the cash value of the policy or paid up term insurance, this is because the right to so elect was in the insured and could only be so asserted. It does not follow that the payment of the loan from other sources than the reserve is a condition precedent to the right to extended insurance. That is a right which accrued automatically without any affirmative act of election. Such seems to us a reasonable construction of the policy. The extension condition is, to say the least, ambiguous and needlessly so. Its words were of the insurer's selection. Life insurance is in its nature complex and difficult for the layman to understand. Policies are prepared by experts who know and can anticipate the bearing and possible complications of every contingency. So long as insurance companies insist upon the use of ambiguous, intricate and technical provisions which conceal rather than frankly disclose their own intentions, the courts must, in fairness to those who purchase insurance, construe every ambiguity in favor of the insured. *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912 D. 483. As said in *Stark v. John*

Hancock Mut. Life Ins. Co., supra, in answer to the same contention as that advanced by the company here:

"If it had been the intention of the company to render nugatory its promise to continue the policy as paid-up insurance after two premiums had been paid, in the event there was existing indebtedness, it would have been easy to say so in unambiguous, unequivocal language."

We hold that, under this policy itself, the fact of the loan did not forfeit the right to extended insurance for the full amount of the policy.

Nor do we find that the loan contract gave the right to the insurance company to forfeit this extended insurance after the death of the insured. The loan contract does provide that:

"Upon any default hereunder in premium or interest, after delaying not less than thirty days from default (demand and notice being waived) the company may terminate said policy and obtain the amount due on said sums by deducting and retaining the same from the reserve on said policy, and the overplus, if any, shall at once be applied as a single premium of life insurance, at the present published rates of the company, to the purchase from the company, upon the life of said insured, at insured's age at such due date, of fully paid-up insurance for such amount as such overplus will so buy, payable under the same conditions as said original policy, but without premium return or participation in profits or further payment of premiums and thereupon said pledged policy and all provisions and insurance thereunder are cancelled and surrendered to the company."

This was intended only as furnishing to the company a means of foreclosing the lien on the policy by cancelling the policy prior to a loss thereon incurred by death of the insured. It was never intended as a forfeiture of rights or of the cancellation of a liability which had become vested and accrued by the death of the insured. *Stratton's Adm'r v. New York Life Ins. Co., supra; Drury's Adm'x v. New York Life Ins. Co.,* 115 Ky. 681, 74 S. W. 663, 103 Am. St. 351, 61 L. R. A. 714. No foreclosure was then necessary or pos-

sible. The loan provision of the policy itself takes care of that contingency. It provides, as we have seen, that any indebtedness to the company from the insured, beneficiary or assignee, shall first be deducted in any settlement of this policy.

In the *Stratton* case, judgment was awarded for the full amount of the policy without any deduction of the amount of the loan, apparently on the theory that the loan had been paid in the reduced period of risk. We are not satisfied with the soundness of that view. Had there been no lapse of the policy the appellant could only have recovered the amount of the policy less the amount of the loan. At any rate the appellant admits, both in her complaint in the court below and in her brief in this court, that the amount of the loan should be deducted from the amount due in settlement of the policy.

The judgment is reversed, and the cause is remanded with direction to enter judgment for appellant in the sum of $5,034.75, with interest from May 23, 1914, the date of proof of death, less the amount of the outstanding loan and accrued interest thereon at six per cent per annum, and less, also, the amount of the unpaid premium and interest thereon at six per cent per annum.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12764. Department One. June 1, 1916.]

PAUL LINDBLOM, *by his Guardian etc., Respondent*, v. HAZEL MILL COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS—QUESTION FOR JURY. It is a question for the jury to determine whether an inexperienced youth, working for one week as offbearer at an edger, was guilty of contributory negligence in stepping into the space between the edger and the rolls and placing his feet on the base of the edger frame to push a heavy cant, instead of adopting a safer method by taking advantage of the momentum before it had stopped, where he had received no instructions and testified that he had no knowledge of a safer way; and it is immaterial that he knew that unguarded saws were there where if his foot slipped they would probably injure him, since it was not incumbent on him to keep them at all times in mind.

SAME—FACTORY ACT — GUARDING SAWS — EVIDENCE — INSPECTOR'S CERTIFICATE. The fact of a factory inspector's passing a mill having an open backed edger without guard for the saws is only *prima facie* evidence that the saws were guarded where practicable in compliance with the factory act.

SAME—FACTORY ACT—GUARDING SAWS — FEASIBILITY — EVIDENCE. The fact that larger edgers were safely operated with a board at the back to guard the saws, and that a smaller edger was operated for some months while so guarded, is competent to show that it was feasible to use the guard on the smaller machine without added danger to others.

NEGLIGENCE—COMPARATIVE NEGLIGENCE — INJURIES TO SERVANTS—INSTRUCTIONS. Under the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-8, adopting the doctrine of comparative negligence in certain cases, an instruction is as favorable to defendant as the law warrants, where the jury were told that there may be a recovery notwithstanding the negligence of the plaintiff, if he was exercising ordinary care, and his negligence was slight in comparison with defendant's negligence, and if so, and the defendant's negligence was gross in comparison, and the plaintiff, although not exercising extraordinary care, was in the exercise of ordinary care, he would be entitled to recovery.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS — INSTRUCTIONS. Error cannot be assigned on an instruction to which no exception was taken.

[1]Reported in 157 Pac. 998.

NEGLIGENCE—COMPARATIVE NEGLIGENCE. On conflicting evidence, both the fact and the degree of comparative negligence, where the doctrine obtains, are questions for the jury.

APPEAL—REVIEW—INSTRUCTIONS AS A WHOLE. Error cannot be predicated upon isolated parts of an instruction where other parts explicitly covered the point.

APPEAL—DECISION—PRESUMPTIONS PENDING APPEAL. A former decision holding the workman's compensation act constitutional, from which an appeal is pending in the United States Supreme Court, will be assumed correct until that court has decided to the contrary.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered September 19, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

Hadley, Hadley & Abbott, for appellant.

Kellogg & Thompson, for respondent.

ELLIS, J.—Action for personal injuries. Plaintiff, a youth of nineteen, came to this country from Finland in July, 1913. In the latter part of that month, he started to work for defendant. For a time he worked on the slab saw, and for seven days prior to the accident he worked as offbearer behind the edger. The edger machine contained four or five rapidly revolving saws and was used to cut large timbers, called cants, into narrower pieces and rip off the slabs. The timber was fed through a series of rolls in the edger machine, the lower of which were live rolls and forced the timber through the saws and finally out at the rear of the edger onto a platform of dead rolls. It was the duty of the offbearer to throw the slabs from the timber as it lay on the dead rolls and then, by means of a trip or lever, cause a series of small rollers revolving at right angles to the platform to lift on a slant and cause the timber to move sideways onto a set of live rolls by which it was carried away. There was an opening in the floor covering the whole space underneath the edger machine through which the sawdust and

splinters dropped into a conveyor below. The edger in question was fifty-two inches wide in the clear between the sides of the frame enclosing the saws. The frame was closed except at the back where there was an opening towards the dead rolls between the top of the cast iron base of the edger, which rested upon the floor, up to the live rolls in the edger. The iron base of the edger was about ten inches high. This opening was about fourteen inches wide and extended the whole width of the edger between the sides of the frame. The saws were about nine inches from this opening. There was a space between the dead rolls and the edger itself sufficiently wide to allow one to pass through. The evidence shows that even an experienced offbearer would occasionally find it necessary to get into this space and push the heavy cants forward onto the dead rolls before removing the slabs and tripping the timber to the offbearing rolls.

On August 23, 1913, a cant six inches thick and estimated by different witnesses at between two and three feet wide and between twenty-four and thirty feet long, which had passed through the edger and had been cut into six by six inch sections, failed to clear this space by six or eight inches. Plaintiff went into the space, and in attempting to shove the timber forward, placed his feet on the base of the edger frame below the opening. While so braced and pushing, his left foot slipped into the opening, coming in contact with the saws, which cut into the heel and the tibia and partially severed the great toe. At the time of the injury, defendant was in default in the payment of an assessment which had been made and demanded by the commission under the provisions of the workman's compensation act. Plaintiff elected to sue for damages under § 8 of that act. When all the evidence was in, defendant moved for a directed verdict, which was denied. The jury returned a verdict for $1,625. A motion for a new trial was overruled. From the judgment on the verdict, defendant appeals.

The appellant's contentions, though presented under many subdivisions, may be compendiously covered as follows: (1) That the respondent failed to exercise ordinary care; (2) that he failed to show that it was practicable to guard the opening in the edger, having due regard to its ordinary use and the danger to employees therefrom, as required by the factory act; (3) that appellant furnished a safe way to perform the work and respondent voluntarily chose a dangerous way; (4) that the court erred in giving a certain instruction; (5) that the workman's compensation act is unconstitutional.

There is evidence that the safe performance of the work in which respondent was engaged was not so simple as a mere observation might lead one to believe. One witness, an experienced offbearer, testified, in substance, that heavy cants often stopped before clearing the space between the edger and the offbearing rolls; that in such cases, when he was new at the work, he had often found it necessary to step into this space and push the cants clear of it before lifting the side rolls, but that by experience he learned how to avoid this and take advantage of the momentum of the cant as it left the edger by placing his hands upon it and keeping it moving so that it would clear the space without stopping. The respondent was a youth of nineteen years with only a few weeks of experience in any kind of mill work. He was not instructed as to this safer way of doing the work. He had received no instruction. He testified that he did the work as he had seen others do it. Whether, in view of his inexperience and lack of knowledge of the safer way, he was guilty of negligence in stepping into this space and bracing himself by placing his feet on the base of the edger frame in order to push this heavy cant was a question for the jury. Under no rule could he be held to the exercise of more than ordinary care for his own safety. Ordinary care in such a case would be that care which would be ordinarily exercised by a person of the same experience and knowledge under the same circumstances. Whether, under all the circumstances, he exercised ordinary

care was a question for the jury. *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3.

Nor does the fact that he knew that the unguarded saws were there and that if his foot slipped he would probably be injured charge him with contributory negligence as a matter of law. He was not operating the edger. His mind was doubtless intent upon his own particular task. It was not incumbent upon him as a matter of law, "at all times to remember at his peril every unguarded device in the mill about which he was employed." *Rector v. Bryant Lumber & Shingle Mill Co.*, 41 Wash. 556, 84 Pac. 7.

There was a sharp conflict in the evidence as to whether it was practicable to effectively guard the opening in the edger, having due regard to its ordinary use and the danger to employees therefrom. Several of appellant's witnesses, some of them experts, others not, gave it as their opinion that it would be impracticable to close this opening without great danger to other workmen; that, without the opening, splinters or large chunks would not have room to fly clear of the saws at the back and would be carried around by the saw teeth and thrown out through the front rolls when opened for the reception of the next cant, thus endangering the edger man or others in the mill working back of him. The deputy state factory inspector testified that he inspected the mill in August, 1913, and then noticed the open back of the edger. His testimony implies that he then passed the mill as meeting the requirements of the factory act, but no certificate to that effect of that date appears in the record. He again inspected it in October, 1913, and ordered the board which had been placed in the opening immediately after the accident to be removed because he thought it dangerous to other employees. So far as the record shows, the only actual certificate of inspection he ever gave passing the mill as meeting the act was on July 13, 1914, about a year after the accident, at which time the back of the edger was open. At any rate, his passing the mill and his certificate were only *prima*

facie evidence that the open backed edger met the requirements of the factory act. The appellant asserts that there was no competent evidence to the contrary. There was, however, evidence that other edgers, though larger than this one, were safely guarded by closing entirely, or the placing of bars or slats across the opening next to the offbearer's position.

Appellant contends that this had no tendency to prove that the edger here in question could have been so guarded, apparently assuming that, in the larger edgers, there is a greater clearance between the saws and the back of the edger. One witness testified that he thought there was a larger clearance in the larger machines, but admitted that he did not know. Another, who had worked on a larger machine for a long time the opening in which was guarded by perpendicular wooden slats, testified that the saws were only six or eight inches back of the opening. The fact that the larger machines were safely operated for long periods of time when so guarded was obviously some evidence that this small machine could have been safely operated when so guarded. In the absence of anything in the evidence showing a difference in the clearance, we cannot assume such a difference. It is true that verdicts may not rest upon pure speculation. It is also true that verdicts resting upon competent evidence may not be set aside upon pure speculation. *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054; *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313; *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78. Moreover, the fact that this machine was effectively guarded by placing a board in the opening while being operated for several months after the respondent's injury, without any injury to other employees, was competent evidence that it was feasible to guard it without added danger to others. That this evidence was competent for this purpose, though not as an admission of past negligence in not

so guarding, is settled law in this state. *Erickson v. McNeeley & Co., supra; Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588. Whether the saws could have been advantageously guarded under the factory act was one of the principal issues in the case. The evidence was conflicting. The question was for the jury. *Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140; *Dolan v. Slade Lumber Co.*, 69 Wash. 22, 124 Pac. 133; *Rommen v. Empire Furniture Mfg. Co.*, 66 Wash. 48, 118 Pac. 924.

Section 8 of the workman's compensation act provides that in cases of this character the doctrine of comparative negligence shall obtain. 3 Rem. & Bal. Code, § 6604-8.

The court instructed the jury touching comparative negligence as follows:

"The law of comparative negligence is that there may be a recovery in a case of this kind although the person so injured may have been guilty of negligence, if he was at the time 'exercising ordinary care and his negligence was slight in comparison with the negligence of the defendant,' . . . and if on comparing the negligence of the plaintiff with that of the defendant the negligence of the plaintiff was slight in comparison with that of the defendant, and that of the defendant gross in comparison with the negligence of the plaintiff, and the plaintiff, although at the time not exercising extraordinary care, which was not required of him, was at the time in the exercise of ordinary care which the law required of him, then and in such case, the plaintiff would be entitled to recover in this case, and in such case, if you find it to be the case from the evidence by a fair preponderance thereof, your verdict should be for the plaintiff."

This instruction was as favorable to the appellant as the authorities warrant. 1 Thompson, Negligence (2d ed.), § 269 *et seq.*; 29 Cyc. 559; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Chicago v. Stearns*, 105 Ill. 554; *Stratton v. Central City Horse R. Co.*, 95 Ill. 25; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222. At any rate appellant took no exception to it, and it must be taken as a correct

statement of the law as applied to this case. Since, as we have seen, the evidence made a case for the jury, both on the question of the appellant's negligence and of respondent's contributory negligence, the question whether the one was slight and the other gross in comparison was also, under this instruction, one for the jury. Obviously the court, on conflicting evidence, can no more assume to make the comparison than it can assume to pass upon the question of negligence or contributory negligence. The degree of negligence is as much a question for the jury as is the fact of negligence, wherever the minds of reasonable men might differ on the subject.

The question as to whether there was a reasonably safe way of doing the work and the respondent voluntarily assumed a dangerous method is but a phase of the question of contributory negligence. This point is but vaguely and inferentially argued. It seems to be based upon the claim that respondent could have avoided going into the space between the edger and the dead rolls by using the trip or lever to incline the side rolls and using the pickaroon to pull the cants, a piece at a time, onto the offbearing live rolls. The respondent and another witness testified, in substance, that the space where he could usually reach the trip or lever with his foot was obstructed by other lumber so that he could not reach it, and that he was not furnished with a pickaroon. True, these things were denied by other witnesses, but the conflict of evidence on this point, as on other items going to contributory negligence, and as to whether, under all the circumstances, there was reasonable necessity for going into the open space to push the cants with the hands, made a question for the jury.

The only instruction complained of was to the effect that if it was practicable to guard the saws, "with due regard to its ordinary use and without impairing the same," and that employees thereat were liable to come in contact with the saws, then the certificate of inspection by the commissioner

of labor and the fact that the same was in force at the time of the injury would not of itself be a sufficient defense. It is argued that this instruction was fatally defective, in that it failed to leave to the jury the question whether the saws could have been guarded without danger to employees therefrom. It is true these words are included in the factory act, and if this were the only instruction on the subject there would be some force in appellant's criticism. Several other instructions, however, were given which covered this point explicitly, one of them using the exact language of the statute several times. We have so often held that error cannot be successfully predicated upon isolated parts of a charge that citation to the point seems unnecessary.

The claim that the workman's compensation act is unconstitutional is not discussed further than to indicate that it is raised for the purpose of saving the question in view of the appeal to the supreme court of the United States from our decision in *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, holding the act constitutional. Until that court has decided to the contrary, we must assume that our former decision is correct.

We find no error in the record warranting a reversal. The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12774. Department One. June 1, 1916.]

SOPHIE IHRKE, *Appellant*, v. CONTINENTAL LIFE INSURANCE & INVESTMENT COMPANY, *Respondent*, F. L. SHERWOOD *et al.*, *Defendants*.[1]

VENDOR AND PURCHASER—CONTRACTS—BREACH—REMEDIES OF VENDEE—LIEN FOR MONEY PAID. Where the completion of an executory contract for the sale of land is prevented by the default or wrongful act of the vendors, who have put it beyond their power to convey, the vendee is entitled to a lien upon the land for the amount paid on the purchase price, as against the vendors and subsequent purchasers with notice.

SAME. The right to such a lien is not affected by the fact that, in this state, there is no vendor's lien upon the lands for unpaid purchase money.

SAME. The refusal of a vendee to make further payments on an executory contract for land, after the vendors prevented completion of the contract by putting it out of their power to convey, and the commencement of a suit for rescission and damages, does not constitute such a rescission of the contract as to prevent the vendee from claiming a lien on the land for the amounts paid on the purchase price.

SAME—CONTRACT—MUTUAL COVENANTS—BREACH—RESCISSION. An agreement in an executory contract for land to convey a bearing orchard, to be planted and matured by the vendors prior to the payment of the last installment of the purchase price, is not an independent covenant, but the covenants were mutual and dependent, without separation in regard to the consideration, and breach of such clause is ground for rescission.

SAME—REMEDIES OF VENDEE—RESCISSION—WAIVER. The refusal of a vendee to make further payments on an executory contract for land, after the vendors prevented completion of the contract by putting it out of their power to convey, is not a default by the vendee which would forfeit the right to relief.

LIMITATION OF ACTIONS—IMPLIED LIABILITY ON WRITTEN CONTRACT. Semble, that an action by a vendee in an executory contract for land, for a rescission, and the recovery of purchase money paid and to have the amount declared a lien on the land, on account of the fraudulent representations of the vendors and breach of covenants, and their default and wrongful acts in preventing performance by

[1]Reported in 157 Pac. 866.

putting it out of their power to convey, is an action upon an implied liability arising out of a written agreement, the limitation of which is six years.

SAME—PLEADING—DEMURRER. A complaint must show on its face that the action is barred, to be subject to demurrer upon the ground that the action is not commenced within the time limited by law.

VENDOR AND PURCHASER—REMEDIES OF VENDEE—RESCISSION—RECOVERY OF MONEY PAID—WAIVER. The giving of a mortgage by the vendors does not give the vendee the right to rescind an executory contract for the sale of lands; hence delay until foreclosure started does not amount to laches waiving the right of rescission and recovery of money paid.

SAME. The vendee's right to rescind an executory contract for the sale of land and recover money paid is not waived by failing to litigate the same in an action brought to foreclose a mortgage wrongfully placed on the lands by the vendors; since paramount title may not be litigated in a mortgage foreclosure.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered November 12, 1914, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief, tried to the court. Reversed.

Geo. W. Belt, for appellant.

Luby, Pearson & Dillard, for respondent.

FULLERTON, J.—This is an appeal from a judgment of dismissal with costs, entered in the action after a demurrer had been sustained to the complaint and the plaintiff had elected to stand on her pleadings. The ultimate question presented for decision therefore is, Does the complaint state facts sufficient to constitute a cause of action?

In the complaint it is alleged: That in the year 1908, the defendants F. L. Sherwood and Nannie S. Sherwood, being then the owners of a certain tract of land situated in Spokane county, caused a part of the same to be platted into ten-acre tracts, recording the plat in the office of the auditor of that county; that, after platting the lands as stated, the defendants named, using the name of Sherwood Immigration Company, undertook the sale of the tracts, and to induce

plaintiff and others to purchase the same, caused to be published and circulated circulars or folders containing, among other things, the following statements: "We plant choice branches of fruit trees of your own selection; an expert will prune, spray, cultivate and care for them for you in every way for four years free, replacing any trees that should die, turning over to you a bearing orchard which will pay you a yearly profit of from $300 to $500 per acre, and the land will have increased in value to three or four times its original cost. All this included in the first cost." That the plaintiff read such statements and representations, and being desirous of obtaining and owning a bearing orchard, and believing and relying upon the representation so made as aforesaid, did, on December 29, 1908, enter into a written contract with the Sherwoods for the purchase of the south half of one of the platted tracts, containing 5.68 acres, agreeing to pay therefor the sum of $1,900 in the following manner: $100 cash on the execution of the contract, and the balance in monthly installments of $11 each; the Sherwoods, by the terms of the contract, agreeing to plant the tract so purchased to fruit trees, cultivate and care for the same for a period of four years, replace all that should die during the period at the proper season, and convey the title to the plaintiff by a good and sufficient conveyance when the last of the installment payments should be made.

It is further alleged that, on April 19, 1911, F. L. and Nannie S. Sherwood conveyed the property, with other lands, to the defendant F. B. Rutherford, which conveyance by its express terms provided and stipulated that Rutherford assumed the obligations of Sherwood and wife in the contract made by them with the plaintiff, and agreed to carry out its conditions on their part to be performed; that, by mesne conveyances, Rutherford and wife conveyed an interest therein to one D. A. Morrison; and that, on December 15, 1911, Rutherford and wife and Morrison, being then the owners of the legal title to the property, mortgaged the same, with other

lands, to the defendant Continental Life Insurance & Investment Company, to secure the sum of $10,000; that, on January 20, 1913, the defendant last named commenced an action to foreclose its mortgage and sell the tract in satisfaction of the amount due upon the mortgage, claiming and alleging that the plaintiff's contract was subject and inferior thereto, but that the plaintiff appeared in such action and contested the allegation, and that the court decided that the defendant took its mortgage with full knowledge of the contract.

It is further alleged, that the Sherwoods planted the tract to fruit trees in the spring of 1909 and cared for them for about two years, but thereafter the tract and trees were wholly neglected, the trees not being sprayed, pruned or cared for or the land cultivated as agreed in the contract, so that a large number of the trees died and the remainder were so stunted in growth as to be of little if any value, and that no amount of cultivation in the future can overcome or repair the injury occasioned by the neglect; that plaintiff did not discover until about four or five months after the tract had been conveyed to Rutherford that the trees were being neglected, but that on discovering the fact she called the attention of the Sherwoods and the attention of Rutherford to the fact, and notified them that, unless the contract with reference to the trees was carried out, she would not make any further payments on the contract, but would rescind the same, whereupon the Sherwoods and Rutherford promised and agreed with the plaintiff that if she would continue the payments they would at once replace the dead trees, and otherwise place the land and the trees thereon in a first-class condition, and if necessary so to do would plant an entirely new orchard thereon; and that the plaintiff, relying on the promises, continued to make payments in accordance with the contract until the commencement of the foreclosure action before mentioned, at which time she ceased, fearing that all of her interests in the property would be lost by such proceedings;

and that the foreclosure action was concluded only a few days before she commenced the present action.

It is further alleged that neither the Sherwoods nor Rutherford kept the promises made by them to the plaintiff with reference to replanting and caring for the tract and orchard, but suffered the same to remain in the condition they were at the time the promises were made; that the plaintiff did not take possession of the tract, and made the subsequent payments on the contract in the belief that the promises had been kept, a fact she did not know until after the foreclosure action had been commenced.

It is further alleged:

"That the representations and statements contained in said folder, or circular, hereto attached, as to the kind and quantity of fruits which tract had and would produce and the profits which had and would be realized therefrom, were false and misleading and known to be such by said Immigration Company at the time they were made; that as plaintiff is informed and believes and alleges the fact to be, the net profits possible to be realized on said land from any kind of crop or use are little or nothing, and uncertain; that at and before entering into said contract said Sherwood represented and stated to plaintiff that said land was worth at that time $1,900 but plaintiff alleges upon information and belief that said tract was not then and is not now of more value than $100 per acre; that plaintiff is a widow and has no one to advise and counsel with concerning matters of business and has no knowledge of or experience in business matters and she relied explicitly upon the representations made to her as above alleged; that plaintiff is a woman of small means with no knowledge of fruit growing or the proper method of planting, cultivating or caring for fruit trees, and plaintiff was induced to enter into said contract of purchase by the said representations and promises made to her that at the end of four years she would have a bearing orchard which would furnish her a living, and but for such representations she would not have entered into said contract; that said defendants, other than said Insurance Company, and said persons through whom title to said tract passed, are all insolvent and unable to respond in damages in any amount whatever, and

said F. B. and D. H. Rutherford are residents of Oregon and are not now within the state of Washington and plaintiff has no adequate remedy, except by rescission of said contract, which she elects to do and to pray for a recovery of the money paid on the purchase price of said contract and that the amount thereof be made a lien on the south half of said tract four."

The prayer of the complaint is for a judgment and decree rescinding the contract, decreeing the amount paid thereon to be a lien on the land, ordering a sale of the property to satisfy the lien, and for general equitable relief.

The defendant Continental Life Insurance & Investment Company alone appeared. The demurrer which it interposed and which the trial court sustained was based upon two grounds: (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that the action was not commenced within the time limited by law. The reasons which moved the court to sustain the demurrer do not appear on the face of the record, nor does it appear upon which of the grounds stated the ruling was rested. The respondent's learned counsel have, however, made a well ordered statement in their brief of the questions involved, and in this order we shall notice them.

The first contention is that the plaintiff, in order to have a cause of action against the defendant, who is respondent on this appeal, must have a lien of some sort upon the property contracted to be purchased, and that, under the laws of this state, no such lien arises from a mere executory contract to purchase real property, even though a part of the purchase price may be paid and though the vendee may be excused, because of the acts of the vendor, from paying the remainder. The case cited from this court and principally relied upon to maintain the principle is *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 Pac. 658. In that case one Lee contracted to sell to Manheim certain lots in the city of North Yakima for a consideration of seven thousand five hundred dollars, five hundred dollars to be paid in cash and the remainder on or

before a subsequent date named in the contract. Manheim was a married man at the time, and subsequent thereto his wife died, leaving six children, four of whom were adults and two of whom were minors. Manheim was unable to comply with his contract, and notice of forfeiture was served upon him. Later on he made a written acknowledgment of forfeiture, reciting therein that "said contract is at an end, and that all rights thereunder have been forfeited." The action was brought against the heirs of Mrs. Manheim by a subsequent purchaser from Lee to quiet the title as against the heirs of Mrs. Manheim. Judgment went in favor of the purchaser in the court below, and on the appeal the judgment was affirmed. In the course of the opinion this language was used:

"It is, therefore, plain from our previous holdings upon contracts of this character that, until the contract was performed, no title, either legal or equitable, passed from the vendor to the community; and that, upon the failure of the Manheims to comply with the terms of the contract, no interest whatever in the property was vested in the Manheims, or in any one claiming through them.

"Conceding that whatever interest William Manheim acquired in the contract, or the sale to which it referred, was a community interest, that interest necessarily depended upon the fulfillment of the contract. William Manheim was the agent of the community, and was authorized under the statute to have the management and control of the community property. Rem. & Bal. Code, §§ 5917, 5918 (P. C. 95 §§ 27, 29). And until the interest which he acquired at that time became an absolute interest, and vested some sort of title in the community, the community had no greater interest than William Manheim himself. It is plain, we think, that William Manheim, having acknowledged that the contract was at an end, and that all rights thereunder had been forfeited, is in no position to claim any interest in the contract, or in the real estate to which it referred. And therefore it seems plain that, this claim being made through him, the community has no interest. For whatever interest the community acquired, it acquired through the act of William Manheim. The interest of the community was incipient, and until it ripened into a com-

pleted interest, the community acquired nothing. It seems too plain for argument that, if Mrs. Manheim had survived the period of the contract, and William Manheim, during her lifetime, had made the acknowledgment which he did make, she would have been bound thereby; and that the contract as to both William Manheim and his wife would have been entirely avoided. The same rule must follow as to those claiming through Mrs. Manheim. We think it is plain, both upon reason and the rule of this court, that the heirs of Mrs. Manheim have no rights under the contract."

It seems to us manifest from this language that the court did not mean to hold that the vendee in the contract of purchase acquired no interest in the property, but rather that he acquired no interest which could not be forfeited in a failure on his part to perform the conditions of the contract. Such, also, is the effect of the decisions to which the court referred. At least none of them hold, either directly or by necessary implication, that one who has entered into an executory contract for the purchase of land, and has paid a part of the purchase price, has no lien on the land for the amount paid, where a completion of the contract is prevented by the default or wrongful act of the vendor.

While our attention has been called to no case from our own decisions where the precise question has been presented, we have cases we think that are analogous in principle. We have held that, where money for the purchase price of land, or some part of the purchase price, is furnished by one person and the deed to the property is taken in the name of another, that other becomes the trustee of the first person to the extent of such first person's interest in the purchase price. *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090, and cases there cited. The principle involved in these cases is not different from the principle involved in the case at bar. In the cases cited, the trust arises in favor of the person furnishing the purchase price, because in justice and equity the property is his, in other words, it was bought with his money. In the case at bar, the plaintiff contracted to purchase the

tract of land in question. She paid, at the time of the execution of the contract, a part of the purchase price, and since that time a large sum on the remaining part. Her vendor, through his own default and wrong, has put it beyond his power to convey the property agreed to be conveyed, even though she pays the remainder of the purchase price. It seems to us that, on the plainest principles of equity, she should have a lien on the property for the amount she had paid, as against the vendor and as against any one purchasing from him with notice of the contract.

The proposition is not without authority. Such a lien was recognized in *Wickman v. Robinson*, 14 Wis. 535; *Bullitt v. Eastern Kentucky Land Co.*, 99 Ky. 324, and *Stewart v. Wood*, 63 Mo. 252. Mr. Jones, in his work on liens, also lays down the rule that "money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice."

The respondent argues, however, that the lien is the corollary of a vendor's lien and exists only in those jurisdictions where a vendor's lien is recognized, and that this court has heretofore held that a vendor's lien does not exist in this state. In *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 63 Am. St. 864, 39 L. R. A. 82, it was held that real estate conveyed by an absolute deed is not subject to a vendor's lien for the unpaid part of the purchase price, because inconsistent with our recording acts. But it was pointed out that the reason for the maintenance of the lien was gone, since a judgment obtained for the purchase money immediately became a lien upon the property under which it could be sold, and that, too, freed from any homestead or other claim of exemption. It is obvious that the reasoning of the case does not apply to the case at bar. Here, in allowing the lien, the recording acts are not violated and no innocent purchaser can suffer because of its enforcement.

Again, it is urged that there can be no lien in the present case under the authority of *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, and *Jones v. Grove*, 76 Wash. 19, 135 Pac. 488, since it was held in these cases that where a contract has been rescinded it is at an end and no rights exist under it. The contention assumes that, in the present case, there has been a rescission of the contract of purchase. But this is not the fact. On the contrary, the very suit is founded on the assumption of an existing contract and a breach thereof, which will result in a loss to the plaintiff if the relief she seeks is not granted. A rescission in the sense that each of the parties will be relieved from the obligations of the contract may be a part of the final decree, but it is plain that no rescission has as yet taken place.

The second contention is that the clause in the contract relating to the planting of the fruit trees is an independent covenant, a breach of which is not ground for a rescission of the contract. In support of the contention, the cases of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106, and *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884, are cited. While in each of these cases the covenants were held to be independent, it can be conceded that they were rightly decided without requiring the holding that the covenants in the present case are so. In the first case, the covenant was in regard to building restrictions and the making of street improvements, and in the others it related to water rights. The reason given for the holdings was that there was no connection in the matter of the promises, that they were to be performed at different times, and went only to separate parts of the consideration. Here the covenants are mutual and dependent. The very contract is to convey a tract of land with a bearing orchard, which was to be planted and matured prior to the time the last of the payments were due. There was no sepa-

ration in regard to the consideration. The land with the orchard was to be conveyed as a whole for the one price, and there is no means of determining what part of the consideration was to be paid for the land and what part for the orchard. The general rule is well stated in 7 R. C. L. 1089, in the following language:

"It is a general rule that where covenants are made by two parties to a deed or agreement and are such that the thing covenanted or promised to be done on each part enters into the whole consideration for the covenant of promise on the other part, or where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent, and neither party can maintain an action against the other, without averring and proving performance on his part. Hence it is that covenants for conveyance of the premises and for the payment of the consideration, in a contract for the sale of lands, are regarded as dependent covenants, as are also covenants by a lessee to pay rent, and by a lessor to make improvements and repairs, without which the premises would be useless for the purposes leased. Covenants are construed to be either dependent on or independent of each other, according to the intention and meaning of the parties and the good sense of the case; and technical words should give way to such intention. But the courts will construe covenants to be dependent unless the contrary intention appears."

In the case before us, if the allegations of the complaint be true, there can be no question, we think, other than that the parties regarded these covenants as dependent.

It is next contended that a vendee cannot maintain an action for a rescission while in default. Stated as a general proposition, this is true. But here the plaintiff was not legally in default. She continued her payments not only until it became apparent that the vendor did not intend to perform, but until he had placed himself in a position where he could not perform. The plaintiff, therefore, had a lawful excuse for refusing to pay further, and she could cease payments with-

out forfeiting her right to such relief as the facts then warranted.

The fourth contention is that the action is barred by the statute of limitations. The defendant construes the action to be either one for relief on the ground of fraud, which must be commenced within three years after the fraud is discovered; or one for relief for a cause referred to in § 165 of Rem. & Bal. Code (P. C. 81 § 75), in which case the action must be commenced within two years from the time it accrued. It seems to us, however, that the action is one upon an implied liability arising out of a written agreement, the limitation of which is six years, rather than an action of the character to which the defendant would relegate it. But be this as it may, we are clear that the complaint does not show on the face that it is barred on either theory, and the objection, to be available on demurrer, must appear on the face of the complaint.

Finally, it is said that the right to rescind, if it ever existed, has been waived by the plaintiff. If we have correctly gathered the respondent's contentions upon this branch of the argument, they are that the respondent was guilty of laches in not commencing her action prior to the time the respondent foreclosed its mortgage, or that she should have litigated her rights in that proceeding. But whatever the fact may actually be, the complaint does not show her derelict in this respect. The fact that her vendor mortgaged the premises after entering into the contract to convey them to her would give her no right of action or right to rescind. He might be able to perform despite the fact. Nor is it to be presumed that she had the right to litigate her present claims in the mortgage foreclosure action. The rule, under our previous holdings to the effect that the question of paramount title cannot be tried in such a proceeding, would seemingly be the other way.

Our conclusion is that the court erred in sustaining the demurrer to the complaint. The judgment is therefore re-

versed, and the cause remanded with instruction to overrule the demurrer and permit the defendant to answer to the merits.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13107. Department Two. June 1, 1916.]

HOLT MANUFACTURING COMPANY, *Appellant*, v. FRANK BROTHERTON *et al.*, *Respondents*.[1]

EVIDENCE—ORAL EVIDENCE—TO VARY WRITING—INDORSEMENT ON NOTE. Oral evidence is inadmissible to vary the legal effect of an indorsement on a note by showing an agreement between indorser and indorsee that it was to be indorsed without recourse.

PAYMENT—EVIDENCE—NOTE IN LIEU OF CASH. Upon the sale of a combined harvester and the execution of a chattel mortgage to secure notes for the price, it is consistent to accept a note "in lieu" of cash for the first installment which was to be paid by delivery of the note, and to describe it in, and secure it by, the mortgage; since taking the note in lieu of cash does not extinguish the debt.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING — CHATTEL MORTGAGES—DEBT SECURED. In the absence of fraud or mistake, a chattel mortgage stating that it was given to secure a note described therein cannot be modified by a previous or contemporaneous oral agreement to the effect that such note was taken in lieu of cash and was not to be secured by the mortgage.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered January 30, 1915, dismissing an action to foreclose a chattel mortgage, tried to the court. Reversed.

Hamblen & Gilbert, for appellant.

Sharpstein, Pedigo, Smith & Sharpstein, for respondents.

MAIN, J.—The purpose of this action was to foreclose a chattel mortgage. The trial of the case resulted in a judgment of dismissal. From this judgment, the plaintiff appeals.

[1]Reported in 157 Pac. 849.

The facts are these: During the year 1912, one Frank Brotherton was the tenant upon a farm or ranch in Walla Walla county, owned by the Stine-Paxton Corporation. On April 29 of this year, Brotherton, in writing, contracted with the Holt Manufacturing Company, a corporation, for the purchase of a combined harvester, the purchase price of which was $3,450. Some time thereafter the harvester was shipped to Brotherton, and received and accepted by him.

On the 6th day of July, 1912, Brotherton gave a chattel mortgage to the Holt Manufacturing Company for the purpose of securing certain notes described therein, which represented the balance of the purchase price. In this mortgage, five notes are described. With the exception of one, all were executed by Brotherton and the Stine-Paxton Corporation. The mortgage recites that it is given to secure the amount specified therein, "according to the conditions of five promissory notes made by the mortgagor to the mortgagee of even date herewith, and payable: No. 1 for $500, due October 1, 1912 . . . The mortgagor agrees that if default be made in the payment of any one of the notes above described, or of any interest thereon, the mortgagee may at its option declare all of said notes immediately due and payable, and this mortgage may be foreclosed."

Thereafter the notes executed by the Stine-Paxton Corporation were paid as they respectively became due. The note for which this action was brought is that described in the mortgage, an excerpt from which is above quoted as for $500, due October 1, 1912. This note was payable on demand, and had been executed by one E. E. LaHue in favor of Brotherton. Brotherton indorsed the note to the Holt Manufacturing Company. The indorsement does not provide that it is made without recourse. This note, though payable on demand, was described in the mortgage as due October 1, 1912, because Brotherton had an understanding with LaHue that the latter would not be called upon to pay the note until approximately that time. There is no question that this note

is the one described in the mortgage as the $500 note due October 1, 1912. And this fact is practically conceded.

It is claimed that this note was taken as cash, and that it was intended to be indorsed by Brotherton without recourse. The defendants offered evidence to the effect that the understanding between the parties was, when Brotherton indorsed and delivered the note to the Holt Manufacturing Company, that it should be without recourse. This evidence was admitted over objection. The effect of such evidence was to vary the legal effect of the indorsement upon the note. For this purpose the evidence was inadmissible. Oral testimony is not admissible for the purpose of showing an agreement between the indorser and an indorsee of a promissory note that the note was to pass without recourse. *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. 889.

The respondents claim that, at the time the harvester was purchased, it was the understanding of the parties that the $500 note was to be received as that much cash. The memorandum contract of purchase contained the recital: "Cash $500 by note due Oct. 1, 1912." The representative of the Holt Manufacturing Company who made the sale testified that the note was received "in lieu of cash." Brotherton testified that it was taken "in lieu of so much cash." The respondents concede that the transfer of this note to the appellant would not operate as a payment in the absence of an agreement to that effect; but they claim that the evidence shows that such was the agreement.

"In lieu of" is equivalent to the expression "instead of," as the word "lieu" is defined in Webster's International Dictionary. It was the custom of the Holt Manufacturing Company, when making a sale of machinery, to require a cash payment. Taking the note instead of cash would not necessarily mean that to that extent the note extinguished the debt of Brotherton. It would be perfectly consistent to accept the note in lieu of cash and give a mortgage to secure the same, together with the other notes. According to the

recital in the memorandum agreement of purchase, the cash payment was to be made by the delivery of the note there specified, which is the note here in controversy. In the mortgage this note is described as one of those secured thereby. Brotherton admits that, at the time he executed the mortgage, he knew the character of the instrument. There is no evidence from which it can be concluded that the describing of this particular note in the mortgage was due to a mutual mistake. Neither is there any evidence to show that including this note in the mortgage was due to any fraud or overreaching.

It is a well known rule that, in the absence of fraud or mutual mistake, a contract in writing cannot be varied or modified by a previous or contemporaneous oral agreement. The only relief sought in this action was a judgment of foreclosure. No personal judgment was requested.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment of foreclosure.

MORRIS, C. J., HOLCOMB, BAUSMAN, and PARKER, JJ., concur.

[No. 13116. Department Two. June 1, 1916.]

MINNIE NORDLUND, *Respondent*, v. GUST PEARSON, *Appellant*.[1]

INTOXICATING LIQUORS—CIVIL LIABILITY—PLEADING — COMPLAINT. In a wife's action for damages through causing the intoxication of her husband, under Rem. & Bal. Code, § 6289, an allegation of resulting "abusive" conduct by the husband is sufficient to admit of proof of physical assaults, in the absence of a motion to make more definite and certain; or at least, if defective, was amendable to conform to the proof.

SAME—PLEADING—ISSUES—EVIDENCE. In such an action, under a complaint seeking recovery for injuries which resulted in the impairment of health as well as loss of support, evidence of worry and mental distress is admissible.

SAME—EVIDENCE—ADMISSIBILITY. In such an action, evidence that the plaintiff went out to work to support the family, including her husband and minor son, is admissible as tending to show the husband's failure to furnish her support, although it incidentally showed that she was also required to support her son and husband.

APPEAL—PRESERVATION OF GROUNDS—OBJECTION TO EVIDENCE—SUFFICIENCY. Where a record showed the testimony in narrative form, part of which was admissible, an objection at the conclusion not stating any grounds nor the part of the testimony objected to, is insufficient as a basis for error.

INTOXICATING LIQUORS — CIVIL ACTION — EXCESSIVE DAMAGES. A verdict for $1,000 for damages to the person and means of support of a wife by causing the intoxication of her husband, under Rem. & Bal. Code, § 6289, held not excessive, considering the husband's earning power and the extent of the impairment of health and loss of support.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages resulting from the sale of intoxicating liquors. Affirmed.

Charles P. Lund, for appellant.

V. T. Tustin and *C. D. Randall*, for respondent.

[1]Reported in 157 Pac. 875.

PARKER, J.—The plaintiff, Minnie Nordlund, commenced this action in the superior court for Spokane county against the defendant, Gust Pearson, seeking recovery of damages which she claims resulted to her in person and means of support from the intoxication of her husband, caused by the selling of intoxicating liquor to him by the defendant on or about December 15, 1912, and at frequent times thereafter. Trial before the court sitting with a jury resulted in verdict and judgment for the sum of $1,000 in favor of the plaintiff, from which the defendant has appealed.

This action was prosecuted under Rem. & Bal. Code, § 6289 (P. C. 267 § 91), which, so far as here necessary to notice its terms, reads as follows:

"Every husband, wife, child, parent, guardian, employee, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained, and the same may be recovered in a civil action in any court of competent jurisdiction."

Respondent and John Nordlund were married in January, 1908. He was engaged in the saloon business for a period of about one year thereafter. He then farmed for a time, and thereafter for a period of about five years preceding the commencement of this action he was engaged in the sewer and cement contracting business. The evidence tends to show that, up until December, 1912, Nordlund was capable of and did provide well for respondent; that since then, by reason of his habits of intemperance, he has failed to provide for respondent even to the extent of the scant necessaries of life; that he has on two occasions made physical assaults upon her in a violent manner, resulting in physical injury to her, and has repeatedly addressed to her coarse, profane and abusive language, which acts of ill treatment have materially

impaired her health; and that all of these acts of Nordlund and the injuries resulting therefrom to respondent, his wife, were in consequence of his intoxication caused by intoxicating liquor furnished and sold to him in December, 1912, and at repeated times thereafter, by the appellant.

Counsel for appellant first contends that the trial court erred in admitting the testimony of respondent of assaults upon her by her husband as the result of his intoxication because not within the allegations of the complaint. We find it alleged in the complaint, following allegations of Nordlund's intoxication and the source thereof, that he "became abusive to the plaintiff and scolded and cursed and swore at this plaintiff; and that by reason of said abusive treatment by her said husband, when he was in an intoxicated condition, the health of plaintiff has been greatly affected and impaired." The argument of counsel seems to be that the word "abusive" as here used is not inclusive of physical assaults upon respondent. We think, however, under our liberal rules of pleading, this allegation is sufficient to admit proof of physical abuse as well as abuse by language. This allegation may have been subject to a motion to make more specific and certain, but it was not so moved against, nor was any surprise claimed upon the giving of respondent's testimony as to these physical assaults, the objection made at the trial being of the most general character. Whatever defect there may have been in the allegations of the complaint in this respect was, in any event, an amendable one. Under all the circumstances, we think it ought to now be considered as amended to fit the proof, if it can be said any such amendment was necessary therefor.

It is contended in appellant's behalf that the trial court erred in admitting testimony of respondent as to her worry and mental distress, etc., as not being a proper element of damages. The argument seems to proceed upon the theory that respondent was seeking recovery only for the impairment of her means of support by her husband's intoxication.

It seems plain to us from the allegations of her complaint and the theory upon which the case was presented to the trial court that she was also claiming, and entitled to claim, damages for her injuries "in person," that is, injuries which resulted in the actual impairment of her health; and since the testimony tends strongly to show that she was so injured in health by her husband's physical assaults and other abuse heaped upon her, this testimony was clearly within the issues and tended to support her claim of injury in person.

Contention is made in appellant's behalf that the trial court erred in permitting respondent to testify that she was obliged to support herself and children. The argument proceeds upon the theory that, since respondent could only claim damages for the impairment of her own means of support, it was prejudicial error to allow her to refer to the support of her children. It is possible that the record could be said to disclose technical error in the admission of this testimony, but when her testimony is critically read we find no reference therein in terms to any children or her support thereof. She was asked, "Tell the court and jury what nature of work you have done to support the family." She then answered, over objection of counsel for appellant, "I went out and washed and scrubbed and everything I could get to do." During this time Nordlund, her husband, was living with her and failing to furnish support to any reasonable extent for the family, consisting of himself, respondent and her minor son who lived with them. We think this evidence was admissible as tending to show her husband's failure in furnishing her the support she was entitled to, though it may have incidentally shown that she was also required to so employ herself in the support of her son and her husband. There was no testimony introduced for the purpose of showing the number or ages of her children, though, as we shall presently see, it did incidentally appear that she had a fourteen-year-old minor son who lived with them. We think there was no prejudicial error in the admission of this testimony.

Contention is made in appellant's behalf that the court erred in admitting the testimony of the minor fourteen-year-old son of respondent that he "sold flowers in order to provide something to eat on several occasions." This remark was made by the son while on the witness stand after he had testified to a considerable extent touching Nordlund's habits of intemperance, the procuring of his liquor from the saloon of appellant, and how he, the son, had on occasions taken Nordlund home in an intoxicated condition. All this testimony of the son appears in the record in narrative form, and the only objection thereto was made at the conclusion of all of it, the record failing to state what the ground of the objection was or to what part of the son's testimony it referred. We think the record in this condition fails to furnish grounds entitling appellant to urge the error complained of in this court.

Contention is made that the trial court erred in the giving to the jury of certain instructions. We have read these with care and deem it sufficient to say that we find no prejudicial error therein. The instructions as a whole seem quite full and favorable to appellant.

Contention is made that the drunken condition of Nordlund was not by sufficient proof traced to the furnishing him with liquor by appellant as alleged. A careful reading of the evidence convinces us that we cannot disturb the verdict on this ground. Finally, it is contended that the verdict is excessive. In view of the evidence showing Nordlund's earning power, the manner in which he supported respondent prior to December, 1912, and the extent of her impairment of health and loss of support, it seems to us that $1,000 is a very moderate compensation to her for the injury received.

It seems quite plain to us that appellant has had a fair trial and that the judgment should not be disturbed by us. The judgment is therefore affirmed.

FULLERTON, HOLCOMB, MOUNT, and MAIN, JJ., concur.

[No. 13118. Department Two. June 1, 1916.]

WILLIAM MASKELL, *Respondent*, v. J. D. ALEXANDER *et al.*, *Appellants*.[1]

NEGLIGENCE—PROXIMATE CAUSE—ACTIONS—EVIDENCE—SUFFICIENCY. A motorcycle racer, practicing on a race track, is guilty of gross negligence, where it appears that he came up behind another rider and crossed in front of him, crowding him off the beaten path although there was ample room to pass without doing so; and such negligence was the proximate cause of an injury to a watchman standing near who was run into by the rider who was interfered with.

SAME—DUTY—MOTORCYCLISTS—WANTON OR RECKLESS ACTS. Motorcycle racers practicing on a race track owe a duty to a watchman stationed on the track to exercise reasonable care and prudence for his safety, and not to wantonly or recklessly injure him.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A policeman employed to watch a gate at a race track during motorcycle practice is not guilty of contributory negligence in taking up his place on the track near the gate where it was necessary for him to be in order to enforce his authority and keep children off the track.

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—RELATION—EVIDENCE. A motorcyclist whose negligence while practicing for a race caused injuries to the plaintiff is shown *prima facie* to be the servant of the defendant, where it appears that defendant owned the motorcycle and exercised control and supervision over it and the rider.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by being struck by a motorcycle. Affirmed.

Crandell, Williams & Crandell, for appellants.

Robertson & Miller and *E. W. Robertson*, for respondent.

HOLCOMB, J.—Respondent was injured on the grounds of the Spokane Interstate Fair on September 6, 1914, between

[1]Reported in 157 Pac. 872.

five and six o'clock in the evening, by a motorcycle rider who was there practicing for a motorcycle race to occur on the fair grounds a week or so later. At the time, respondent was a special park policeman of the city of Spokane, on duty as such daily till five p. m., and was acting as a watchman or a special policeman for the fair management during the motorcycle practice after five o'clock in the evening, daily. His duties were to station himself at a point within the fence which separated the race track from the grandstand and grounds, and to prevent children and other watchers from getting out on the race track and being injured by the motorcyclists. There were at the time four or five motorcycle riders practicing on the race track and, among others, there was one by the name of Weeks, operating an Indian motorcycle owned by appellants; and another operated by a man named Sanders, called the Excelsior motorcycle, owned by the Inland Motorcycle Company. Both the Inland Motorcycle Company and appellants, as the Spokane Cycle Company, were sued by respondent, who alleged that the injury was the result of the combined negligence of both Weeks and Sanders and of the owners of both machines. The charge of the complaint in that respect was that Weeks and Sanders were coming down the track from the north at a speed of from fifty to sixty miles per hour toward the place where respondent was stationed, and when about seventy-five feet from respondent's position, Weeks, being slightly behind Sanders but moving faster, wantonly, recklessly, negligently, and carelessly ran his motorcycle from the right in front of Sanders, causing the rear wheel of his machine to strike the front wheel of Sanders' machine, causing it to swerve or veer to one side, and Sanders negligently and carelessly failed to right and direct his machine, and ran into plaintiff, injuring him.

It was the contention of respondent that both Weeks, the representative of the appellants, and Sanders, representative of the Inland Motorcycle Company, were negligent; Weeks,

by turning in front of Sanders and striking his wheel so as to interfere with Sanders' control thereof; and Sanders, in not righting his machine after it had been struck. The Inland Motorcycle Company admitted that Sanders was its servant and representative. The jury found in favor of defendant Inland Motorcycle Company, thus exonerating Sanders and his principal, and found against appellants, thus finding that Weeks alone was guilty of negligence which was the proximate cause of the injury.

I. It is first contended by appellants that there was no negligence on the part of Weeks, inasmuch as there was no negligence in running at a high rate of speed, since that was the object of their practice, and it was not upon a public street or place; and that there was no negligence in the action of Weeks in turning to the left or crossing Sanders' track, because Weeks and Sanders were both traveling in the center of a beaten pathway which was used by the motorcyclists for their purposes, which was fifteen to twenty feet out from the fence and gate within which respondent was standing; that, when he cut across in front of Sanders, the rear wheel of his machine touched the front wheel of Sanders' machine; that they were then about seventy-five feet away from where respondent stood, and that respondent was standing on the track itself and the gate was close behind him. The evidence for respondent tended to show—and the jury resolved it in his favor—that Sanders was ahead of Weeks in the center of the beaten path at least fifteen feet from the fence against which respondent was standing; that there was ample room for Weeks to pass Sanders; that Weeks crowded Sanders off the beaten path and crossed in front of him so closely that Sanders lost control of his machine. Under such circumstances, it cannot but be considered that, the jury having believed the facts as the respondent's evidence tends to show, Weeks was guilty of gross negligence, and his conduct was the proximate cause of the injury to respondent.

It is next contended that the riders owed no duty to respondent. Respondent was at a place where he was entitled to be and in the exercise of a duty for which he was employed. Being lawfully at the place where he stationed himself, the duty of those engaged in such practice as the motorcyclists was to exercise reasonable care and prudence for his safety. They could not wantonly or recklessly do anything that would result in his injury.

II. Appellants assert that respondent was guilty of contributory negligence or assumed the risk attendant on his occupation in voluntarily taking his place on the track. The only theory upon which this contention could be sustained is that the respondent placed himself in a position or at a point where danger was so obvious and imminent that no person of ordinary care and prudence would have so placed himself. Respondent testified that his back was against the gate and that he was between the gate posts within the fence and in front of the grandstand. It is also shown that this approximate position was one which he was directed to take by his employer; that it was necessary for him to be there in order to see over the fence and enforce his authority to prevent children and other spectators from getting over the fence and out on the race track. There is nothing in the evidence to show that respondent was guilty of any other act which in any way contributed to his injury, or that he failed to do any other act by which he could have avoided the injury, than by merely stationing himself within the fence and the gate.

"If a person, in doing that which it is his right to do in the discharge of his duty, exercises ordinary care and prudence, he is not chargeable with contributory negligence as matter of law, although the result showed that he imperiled his life or personal safety in doing as he did." 29 Cyc. 523.

"He whose duty it is to care for the safety of others may do so, even though his duty leads him into great and visible dangers, and not be chargeable with contributory negligence." 7 Am. & Eng. Ency. Law (2d ed.), 396.

We see nothing negligent in respondent's action. He had no reason to suppose that, while stationed within the gateway of the fence inclosing the race track, he would be run into and injured as a result of the recklessness of the rider of one of the motorcycles. He was lawfully there, and it was the duty of those present using the race track to use care and take notice of him and not to injure him. *Kathmeyer v. Mehl* (N. J.), 60 Atl. 40; *Douglas v. Converse*, 248 Pa. 232, 93 Atl. 955.

III. Appellants argue most strenuously that Weeks was not an employee or servant of the defendants, and that the principle *respondeat superior* cannot apply. They concede in their brief that there was sufficient evidence to make a *prima facie* case of the ownership of the machine on which Weeks rode. And this was made conclusive by the testimony of defendant Alexander himself. We have held in *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329, that in cases of this kind, where it is shown that the vehicle doing the damage belonged to the defendant at the time of the injury, that fact establishes *prima facie* that the vehicle was in possession of the owner. It was also said in that case that, this being the rule, it is plain that the plaintiff made a case for the jury and the court did not err in refusing to direct a verdict in favor of the defendants. To the same effect are the automobile cases of *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59. *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165, is cited as stating a contrary view. In that case an automobile was in use by a borrower, and during its use an accident occurred and the owner was sued. Defendant moved for an instructed verdict, which was granted, and plaintiff appealed. This court said:

"This court has frequently held that, before a verdict can be sustained, it must be supported by substantial proofs.

. . . The fact that the automobile was admitted to belong to the defendant, and that the driver of the automobile was in the employ of the defendant, was sufficient to put the defendant upon proof that the automobile was not used in his business or for his employment, has been held in a number of cases. [Authorities cited.] But where upon the defense it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the injury in the defendant's employment or upon his business, and was being used by some other person on business of his own and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment under Rem. & Bal. Code, § 340."

A similar view was expressed by this court in *Bursch v. Greenough Bros. Co.*, 79 Wash. 109, 139 Pac. 870. In the last cited case, it was conceded that defendant owned the auto which did the injury, and the court held that the sole question was whether the driver was acting within the scope of his employment, and the evidence was practically undisputed that he was not; and such was the fact in the *Ludberg* case. In the case at bar, there is evidence tending to show not only the ownership of the motorcycle in appellants, but that appellants exercised control and supervision over the motorcycle and over Weeks, the rider. There was some testimony as to admissions made by Mr. Alexander in reference to his control of the rider. There was sufficient testimony to make it a question of fact for the jury whether Weeks was a mere gratuitous bailee of the motorcycle or was an agent or servant of appellants. It was shown that Mr. Alexander joined with the owners of the other motorcycles which were entered in the race in selecting judges to preside over the race and in adopting rules to govern and control the details of the racing, and that at one meeting, after the accident and injury to respondent, Mr. Alexander had declared that, unless Weeks could ride in the race, none of the other riders of Indian motorcycles should ride. He had four or five Indian motorcycles entered in the race.

"To constitute the relation of master and servant, and to fix the liability of the former for the negligence of the latter, resulting in injuries to third persons, there must exist a right to select the person claimed to be a servant, and also the power and duty to control his acts in regard to the transaction out of which the injury arose." 20 Am. & Eng. Ency. Law (2d ed.), 180.

See, also, 1 Thompson, Negligence (2d ed.), § 579.

"Employment and payment of a person are not indispensable elements to charge one as a master for the negligence of one who renders him service. When one knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable, as master, for the negligence of such servant, when the act or failure constituting the negligence comes within the apparent scope of the servant's employment, even though the person for whom the service is rendered has not employed or paid the servant." 20 Am. & Eng. Ency. Law (2d ed.), 181.

Under these rules, the evidence which went to the jury was sufficient, if the jury believed it, to establish the fact of employment of Weeks by appellants.

IV. Error is alleged in the giving of instruction No. 8, but there is no argument as to the error contained therein, the statement in the brief being that the instruction is not a statement of the law and is highly prejudicial, the error not having been eliminated by any other instruction in the series. Appellants' exception to the instruction states the reason for the exception as follows:

"That the instruction (No. 8) informs the jury that if they believe from the evidence that the defendants, or any one authorized to act for them, permitted Weeks to use a motorcycle at the preliminary practice races, and that that arrangement was in contemplation of some benefit to be derived or which reasonably might be expected would be derived from the use of such motorcycle in the races to the business of the Alexanders, then the defendants, the Alexanders, would be liable for the acts of Weeks; that the instruction is erroneous in the particular that it leads the jury to believe that if any benefit without the qualification was in

contemplation or could reasonably be expected, then the Alexanders would be liable for the acts of the rider."

The evidence in the case tended to show that the appellants entered four or five of their motorcycles in the races at the request of the management of the fair, and that appellants had expended seven or eight hundred or a thousand dollars in preparing their machines and otherwise fixing for the races, and that they expected to get benefit by way of advertising from the races; that there were four or five riders riding appellants' machines in the races. Whether there was any direct benefit or remuneration going to appellants from the use of the motorcycle by Weeks is not shown, and appellants deny that there was any. But it is not unreasonable to suppose and believe that if appellants were willing to expend a considerable sum of money in preparing their machines for the races, they did so for the purpose of some appreciable benefit to be derived therefrom. We believe the instruction complained of was not erroneous in view of the authorities cited in the preceding paragraph of this opinion. The court had previously instructed the jury (instruction No. 7) that the owner of a motorcycle had a legal right to loan the same, and that, if he did so and the borrower used it in and about his own business and the owner had no management or control over the motorcycle or the borrower while the borrower was so using it, then the owner would not be liable to any one who might be injured by the motorcycle while in such use by the borrower. This correctly stated the law as shown by the authorities previously cited, and this, in connection with instruction No. 8, we think fully covered the law applicable thereto.

We find no error. Judgment affirmed.

MAIN, FULLERTON, and PARKER, JJ., concur.

[No. 13136. Department Two. June 1, 1916.]

I. M. CUSCHNER, *Appellant*, v. PITTSBURGH-HICKSON COMPANY, *Respondent*.[1]

SALES—GOODS NOT ORDERED — ACCEPTANCE — RECOVERY OF MONEY PAID. There can be no recovery for a sum paid for a carload of goods received, some of which were not ordered, where notice of rejection was not given within a reasonable time, and part of such goods were resold in the regular course of business, as there was an acceptance.

SAME—GOODS NOT DELIVERED—RECOVERY OF MONEY PAID. Where a carload of furniture included goods not ordered but which were accepted, there can be no recovery for goods ordered but not shipped unless the value thereof exceeded the reasonable value of the accepted goods in the car.

SALES—DAMAGES TO BUYER—PROSPECTIVE PROFITS—PROOF. In an action for damages through delay in filling an order for a carload of furniture, the evidence of the plaintiff and one of his salesmen that, if the goods had been received in time, they could have been sold at a profit of $650, amounts to no more than an opinion or guess, and is insufficient to sustain a verdict for substantial damages; as prospective profits must be shown with reasonable certainty.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Jackson, J., entered May 24, 1915, upon findings in favor of the plaintiff for nominal damages, in an action on contract, tried to the court. Affirmed.

Samuel R. Stern, for appellant.

Belden & Losey (*Henry R. Newton*, of counsel), for respondent.

MAIN, J.—This action was brought for the purpose of recovering damages alleged to have occurred by reason of the failure of the defendant to manufacture and deliver a carload of furniture at the place and time agreed upon. The cause was tried to the court without a jury, and resulted in

[1]Reported in 157 Pac. 879.

a judgment for nominal damages only. This judgment was the result of the view of the trial court that the contract had been breached, but that the evidence did not establish facts by which the amount of the damages could be measured. From the judgment thus entered, the plaintiff has appealed.

The facts are these: During the month of June, 1913, and for some months prior thereto, the appellant was engaged in the business of selling furniture at retail in the city of Spokane. The respondent was a manufacturer of furniture located at Butler, Pennsylvania. On June 30 of the year mentioned, one Frank Drake, a traveling salesman for the respondent, sold to the appellant a carload of furniture which was to be manufactured and delivered not later than August 15, 1913. Included in this contract, there was an assortment of furniture under a combination referred to as "Tom, Dick, and Harry." In this combination, was included one hundred beds and bed springs.

On July 12, 1913, the appellant, without a request from the respondent, sent it a check for $500 to be applied on account. On August 25, 1913, he likewise sent a check for $1,000. The furniture was shipped from Butler on September 30, 1913, and arrived in Spokane on October 23, 1913. The respondent claims that this delay was due to the necessary time taken in investigating the credit rating of the appellant, and that after the order was accepted, the furniture was manufactured and shipped in the regular course of business of the factory.

During previous years, the Standard Furniture House, of which the appellant was the president, was engaged in the retail furniture business in Spokane, and from time to time purchased quantities of furniture from the respondent. In the early part of the year 1913, this firm became insolvent and made an assignment for the benefit of its creditors. The appellant began business under the name of the Standard Furniture Company on or about March 4, 1913.

When the furniture was shipped, the bill of lading was sent to a bank in Spokane with sight draft attached for $144.55, this being the balance due upon the furniture in the car. The appellant took up this draft, opened the car, and made an invoice of the furniture therein. In invoicing the car, the appellant discovered that a number of articles specified in the "Tom, Dick, and Harry" combination had not been included therein, and claims that furniture not included in the order had been shipped. Thereupon the present action was begun, and the money which had been paid into the bank for the purpose of lifting the sight draft and getting the bill of lading was garnished. Some further reference to the facts will be made when considering the points to which they may be particularly applicable.

The appellant claims three items of damages: (a) For the goods included in the car and not ordered, but paid for, together with the freight upon the same, which amounted to the sum of $263.23; (b) for furniture ordered and which was not delivered, $307.41; and (c) $650 for the loss of profits.

Before the appellant can recover for the goods claimed to have been received but not ordered, it is necessary for him to show that, within a reasonable time after the receipt of such goods, he rejected the same, and so notified the respondent. The evidence fails to show any such notice. On the other hand, there is evidence that at least goods of this class to the extent of $50 were sold out of the appellant's store by one of his salesmen. This was an act of ownership on the part of the purchaser which would be inconsistent with the right of ownership on the part of the seller, and would constitute an acceptance of the merchandise, even though not ordered. When the appellant discovered that there were goods in the car which he claimed were not included in the order, one of three courses was open to him: (a) Accept the goods which had been ordered, and reject the balance; (b) reject all of the goods because there was included in the car

some not ordered, and there was not therein some which had been ordered; or (c) receive and accept all of the goods in the car, both those ordered and those not included within the order. The goods all came into the possession of the appellant. A portion of the goods which were not ordered were sold in the regular course of business. This constituted an acceptance of such goods, even though not ordered. 2 Mechem, Sales, § 1374.

The appellant, having received and accepted the car as it was shipped, would not be entitled to recover upon the second item, that of goods ordered but not shipped, unless the amount of money paid was greater than the value of the carload of goods which had been received and accepted. The total amount paid was $1,644.55. There is no evidence that this sum did not represent the reasonable value of the furniture in the car, including the two classes, that ordered and included therein, and that not ordered and included therein. If the appellant received and accepted furniture of the equivalent in value to the money which he paid, no balance would be due him on account of furniture ordered but not shipped.

The other item for which recovery is sought is that of loss of profits. The appellant claims that, if the goods had been shipped and received within the time contracted for, they would have been sold within the next two or three succeeding months, and that his profits upon such sales would have amounted to the sum of $650. The appellant and one of his salesmen testified that, if the goods had been received, they could have been sold, and that the profits would have been the amount specified. There was no evidence of the overhead charges of the business, of the amount of money invested therein, or of the profits which had been made at any time during the conduct of the business. The evidence offered in proof of the amount of damages was nothing more than the opinion of the witness. It amounted practically to a guess. There was no evidence of facts by which the amount of profits was established, or could be inferred. Prospective profits may

become the measure of damages when they can be properly proved. *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418. Before, however, such profits can become the measure of damages they must be proved with reasonable certainty. *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174; *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100. When the damages sought to be recovered are based upon guess, assumption, or speculation, they are not proved with reasonable certainty. *Jones v. Nelson*, 61 Wash. 167, 112 Pac. 88; *Kopczynski v. Bolcom-Vanderhoof Logging Co.*, 71 Wash. 93, 127 Pac. 601.

As already pointed out, the evidence in this case shows no facts which either establish the amount of profits, or from which such profits can reasonably be inferred. The testimony covering the question of profits was merely an opinion or guess of the witnesses. The damages were not proven with reasonable certainty.

The appellant claims that the evidence as to the amount of profits is within the rule of the case of *Sedro Veneer Co. v. Kwapil, supra*. In that case a contract had been made for the sale of twenty-five carloads of egg case shooks. After the contract had been entered into, the purchaser, through its salesman, had contracted for the sale of all the shooks to his customers in the middle western states. Only five cars of shooks were furnished. The seller brought an action for the balance due upon the five cars, and the purchaser counterclaimed for damages for breach of the contract. In that case the purchase price of the shooks was fixed by the contract; the selling price, by the sales of the shooks to the customers of the defendant in the middle western states. Taking the difference between the purchase price and the selling price, and deducting therefrom the reasonable expense incident to the defendant's selling the shooks to his customers, would fix the amount of the profits with reasonable certainty. The amount of the profits could be ascertained with reasonable certainty from the facts supported by the evidence. In

this case the amount of the profits are sought to be established by the opinion or guess of the witnesses. We think no court has gone so far as to hold that prospective profits may be established by the opinion of witnesses as to the amount thereof.

The judgment will be affirmed.

PARKER, HOLCOMB, FULLERTON, and MOUNT, JJ., concur.

[No. 13153. Department One. June 1, 1916.]

J. W. ANDERSON, *Respondent*, v. WISA H. HALL, *Appellant*.[1]

PLEADING—AMENDMENT—DEMURRER — DISCRETION. After overruling a general demurrer to the complaint and the filing of an answer, it is discretionary for the trial court to deny leave to file an amended answer in the nature of a second demurrer alleging that the action had not been commenced within the time limited by law and that the facts in the complaint did not state a cause of action.

APPEAL—REVIEW—AMENDMENTS. After a full trial on the merits, defects in the pleadings must be disregarded and deemed cured by amendment.

LIMITATION OF ACTIONS—PERSONS BARRED—ADVERSE POSSESSION—QUIETING TITLE. The bar of the statute of limitations against an action to quiet title does not run against one in uninterrupted possession holding adversely under a claim of right.

QUIETING TITLE—EVIDENCE—DEEDS—ADMISSIBILITY. Where plaintiff, upon purchasing land, took title in the name of his father, to whom the deed was delivered, and subsequently took another deed to the defendant, in an action to quiet title against defendant, the prior deed is admissible as part of the history of the transaction and to show that defendant acquired no title.

TRUSTS—RESULTING TRUSTS—DEEDS. The execution of a deed by plaintiff to defendant without other consideration than contemplation of marriage, and its subsequent recordation by plaintiff, vests no more than bare title in the defendant; and a resulting trust exists in favor of the plaintiff, where the deed was never delivered and it

[1]Reported in 157 Pac. 996.

was all done without the knowledge of defendant, at a time when plaintiff, already married, could make no valid contract to marry defendant and defendant broke off the engagement.

FRAUDULENT CONVEYANCES—RIGHTS OF PARTIES—EQUITY—QUIETING TITLE. Where, pending divorce proceedings, the wife made no claim to certain property purchased by the defendant husband and there was no evidence that the same was concealed from her, the fact that he took title in the name of another to avoid future complications concerning the title does not show such a fraud upon the wife as to prevent equity from granting the plaintiff relief in an action to quiet his title.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered April 17, 1915, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

Jas. W. Carr, for appellant.

F. W. Moore, for respondent.

FULLERTON, J.—This is an action instituted by the respondent, J. W. Anderson, against the appellant, Wisa H. Hall, to require her to execute a deed to him of certain real property and to quiet his title thereto against the claims of Mrs. Hall. A decree was rendered in his favor in the court below, from which Mrs. Hall appeals.

On July 27, 1908, Monroe R. Brewster and Mary D. Brewster were the owners of the real property in question, and had theretofore contracted to convey the same to one Peters on the payment of a stated consideration to a bank which held the contract in escrow. The respondent, Anderson, purchased the interests of Peters in the contract, paid the unpaid part of the purchase price of the land to the bank, and on the date given, took a deed from Brewster and wife to the property in which his father, George W. Anderson, was named as grantee. This deed was delivered to the grantee named in it, and while never recorded, was retained by him until introduced into the record as part of the evidence in the present case. On March 27, 1909, the respond-

ent procured the Brewsters to execute a second deed to the property, naming the appellant as the grantee therein. This deed the respondent caused to be recorded on April 13, 1909, without delivery to the appellant. In fact, the deed was never actually delivered to her, and was introduced in evidence at the trial below from the possession of respondent. Both parties agree that the appellant did not know of its execution until sometime after the event happened, but disagree as to the time when it was first made known to her, the appellant testifying that it was prior to the time it was recorded, and the respondent that it was after that time.

The relations existing between the appellant and respondent prior to the execution of the deed are not made very clear by the record. It can be gathered therefrom, however, that the parties knew each other in some other state in their younger days; that their places of residence became separated and that they did not meet again until some twenty-five years later, in 1905, at a time when the respondent passed through this state on his way to the Philippine Islands; that the respondent returned from the islands in the early part of the year 1908 and took up his residence in Kitsap county, and that from that time on the relations of the parties were intimate, each expecting to intermarry with the other. Mrs. Hall testifies that they became engaged to be married when they met in 1905, and that the engagement continued until sometime in the fall of 1911, when she broke it because of the misconduct of the respondent. She further testified that the property was conveyed to her as a gift, made in contemplation of the marriage.

The respondent, while admitting the engagement to marry, testified that it was made at a much later date than the date to which the appellant testified; in fact, that it was made after the execution of the deed, although at that time he anticipated that a marriage might take place between them. He denies the misconduct charged against him, and intimates, although he does not perhaps directly so charge, that the

engagement was broken because the appellant had become enamored of another person, with whom she intermarried some months later. Explaining why neither of the deeds were taken in his own name, he testified that he was then a married man, although he and his wife had lived separate and apart since 1902; that his wife was then contemplating a divorce; that she made no claim to his property, and he did not wish the title complicated by the divorce proceedings; that he changed the deed from his father to Mrs. Hall because of the illness of his father, whom he feared might not survive the divorce proceedings. He also testified that his wife obtained a decree against him in 1909, and that it was subsequent thereto that he entered into the engagement to intermarry with the appellant.

The record shows without contradiction that the respondent paid the entire purchase price of the property, that he has had at all times the sole and exclusive possession of it since its purchase, that he has paid all of the taxes assessed against the property prior to the time of the appellant's last marriage, and that he had expended in permanent improvements on the property upwards of one thousand dollars. The appellant never exercised, or sought to exercise, acts of ownership over the property prior to her marriage. Since that time she has made claims to it in virtue of her deed, and she paid one-half the taxes for the year 1912. The taxes were paid, however, prior to their delinquency, and without the consent or knowledge of the respondent. Between the years the respondent returned from the Philippine Islands and the year the marriage engagement between them was broken, the appellant was a frequent visitor at the place, going there principally on Sundays. She consulted and advised with the respondent as to the improvements he was putting on the place, sent him at different times a few fruit and ornamental bushes for planting, placed a few chickens on the place, and at one time placed a hog thereon. This was done, she tes-

tifies, in anticipation of their marriage, and with the idea that they might make the place their home.

The court in its decree allowed the appellant for her expenditures and services the sum of $102; adjudged that the respondent was the owner of the property, and that the appellant held the legal title to the same in trust for him; directed her to reconvey the property to the respondent, or, in case she failed so to do within a prescribed time, that the clerk, as a commissioner appointed by the court, make such a deed and quiet the title to the property in the respondent.

On this appeal the appellant first suggests a question of practice. After the service of the summons, she appeared and demurred generally to the complaint, which demurrer the trial court overruled. She then answered, putting in issue certain of the allegations of the complaint, and setting up affirmatively the facts upon which she relied to maintain her title. Issue was joined on this affirmative matter by the respondent, and the cause set down for trial. When the cause was called for trial, the appellant's counsel called attention to the fact that he had served notice on the respondent some three days before that he would ask to amend his answer by adding thereto "paragraphs eight and nine, first, that the action was not commenced within the time limited by law; and second, that the complaint did not state facts sufficient to constitute a cause of action," and asked leave to then amend in accordance therewith. The court denied the request on the ground that the offer came too late and was insufficient to constitute a defense in any event. The appellant thereupon moved orally for leave to withdraw her answer and file a demurrer "to the sufficiency of the complaint," which motion the court also denied.

It is argued in the brief of the appellant that the court committed reversible error in these rulings, but we think otherwise. The proffered amendments to the answer were more in the nature of a demurrer to the complaint than the allegations of any fact constituting a defense to the action, and it

was within the discretion of the court whether it would allow a second demurrer to be interposed after answer and after the cause had been put at issue and called for trial, a discretion which this court will not review other than for manifest abuse, and no such abuse is shown.

But the ruling is not erroneous for other reasons. The court at the trial did not deny to the appellant the right to show any fact which tended to constitute a defense to the respondent's action, nor any fact which tended to show a right to the property in herself. Under these circumstances this court is required to review the cause on its merits, disregarding any defect there may be in the pleading. Again, there is no merit in the contention that the complaint shows on its face that the statute of limitations had barred the action set out therein. On the contrary, both the complaint and the evidence introduced at the trial show that the statute was running against the appellant's claim, rather than in its favor. It was the respondent who was in possession, holding under a claim of right, and no bar to his right to maintain an action to test his claim, as against one claiming adversely, could run against him so long as his possession and claim were maintained.

It is next contended that the court committed error in admitting in evidence the deed from Brewster and wife to George W. Anderson. But this was admissible as a part of the history of the transaction if for no other purpose. The appellant claims, however, that the court attached too much importance to it. But, as we read the evidence, he seemingly followed the trend of the parties and gave it no consideration other than such weight as it would have as tending to elucidate the transaction between the parties. It has seemed to us that it might have been given much greater consideration. It is regular upon its face, was made upon a sufficient consideration, was duly delivered, and why it did not convey to the grantee all the interest the grantors named therein had in the property conveyed, is not at once clearly understand-

able. If this be so, the subsequent deed to the appellant conveyed no interest in the property at all, as the grantors had no interest to convey. But treating it as the parties to this action seemingly have treated it, its admission in evidence does not call for a reversal.

The appellant's principal contention is that the execution of the deed to herself and its subsequent recordation, being made in contemplation of marriage, constitutes a completed gift of the property, and that the respondent cannot now repudiate the gift even though the marriage failed of consummation. If the record showed no more than these bare facts, there would be, we think, some foundation for the claim. But the record shows something more than this. The effect of the evidence we have set forth somewhat in detail, and to our minds it justifies the conclusion of the trial court that no gift of the property was intended. The deed was made without the knowledge of the appellant; it was made at a time when no valid contract to intermarry existed between them; neither the deed nor the property itself was ever actually delivered to the appellant; and the appellant paid no part of the purchase price of the property. If the deed conveyed anything to the appellant at all, it conveyed nothing more than the bare legal title, and we conclude that the court was correct in its holding that a resulting trust in the property exists in respondent's favor, entitling him to have the legal title thereto conveyed to him.

The appellant makes the further contention that, if the reason given by the respondent for first having the property conveyed to his father and subsequently to the appellant be accepted as true, it shows that the conveyances were made with the intent to defraud his former wife, and that he cannot, for that reason, have the relief which was granted him by the decree and judgment of the trial court. It is the rule, it is true, that the courts will not aid in the furtherance of a fraudulent transaction or relieve a party from a situation in which he has placed himself by an attempt to perpetrate

a fraud upon another, and this although the person attempted to be defrauded is not himself complaining. But we agree with the trial court that the respondent did not in this transaction attempt to defraud his former wife. In the divorce proceedings she made no claim to his property, and it is not in evidence that he concealed or attempted to conceal his property from her. The device adopted to avoid future complications concerning the title to this particular property may not have been sufficient to accomplish the purpose intended, yet it does not show, when taken with all the circumstances, any intent on the part of the respondent to defraud the wife.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13208. Department Two. June 1, 1916.]

DAVIS-KASER COMPANY, *Appellant*, v. COLONIAL FIRE UNDERWRITERS INSURANCE COMPANY (AGENCY), OF HARTFORD, CONNECTICUT, *Respondent*.[1]

INSURANCE—ACTIONS ON POLICY—VENUE — STATUTES. An action upon a foreign fire insurance policy delivered in, and upon property within, W. county, must be brought in that county, under 3 Rem. & Bal. Code, § 6059-13½, providing that an insurance company may be sued upon an insurance policy in any county where the action arose, "by serving . . . upon the commissioner . . . if an alien or foreign company, or upon any duly licensed agent of the company residing in the county where the cause of action arose."

STATUTES—TITLE AND SUBJECTS—INSURANCE CODE. The title "An act to provide an insurance code . . ." is broad enough to include 3 Rem. & Bal. Code, § 6059-13½, covering the venue of actions on insurance policies and the manner of service of summons therein; since the act, being a complete code on the subject of insurance, the title need not be an index to the act.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered August 28, 1915, dismissing

[1]Reported in 157 Pac. 870.

an action upon a fire insurance policy, upon sustaining a motion to quash service of summons. Affirmed.

Gose & Crowe, for appellant.

E. Eugene Davis (*McCarthy, Edge & Davis*, of counsel), for respondent.

MAIN, J.—The purpose of this action was to recover upon a fire insurance policy for the loss of personal property destroyed by fire. The property covered by the policy was located in Franklin county, and the policy was delivered in that county. The action was begun in Walla Walla county, and service had upon an agent of the defendant company in that county. The defendant was a foreign and not a domestic corporation. A motion was made to quash the service because the action was instituted in the wrong county, and that the superior court for Walla Walla county was without jurisdiction to try the same. The motion was sustained, and a judgment entered dismissing the action. From this judgment the plaintiff appeals.

The principal question in the case is whether the plaintiff had a right to maintain the action in Walla Walla county when the property covered by the policy was located in Franklin county. Section 13½ of the insurance code, Laws of 1911, p. 174, provides:

"Any insurance company may be sued upon a policy of insurance in any county within this state where the cause of action arose, by serving the summons and a copy of the complaint upon the company, if a domestic company, or upon the commissioner, as attorney in fact of the company, if an alien or foreign company, or upon any duly licensed agent of the company residing in the county where the cause of action arose." 3 Rem. & Bal. Code, § 6059-13½.

In *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, the court considered a section of the code of procedure which provided:

"An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code."

In that case the defendant company was served with process in Clarke county, and the cause was tried in Garfield county. The question was whether the court of the county in which the case was tried had jurisdiction. It was there held:

"The court in Garfield county was without jurisdiction to pronounce judgment, and the judgment and all the proceedings in that court were without authority and void."

That case has been followed and approved in *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35; *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906; *Richman v. Wenaha Co.*, 74 Wash. 370, 133 Pac. 467. The cases cited are controlling here.

Some mention is made in the briefs that the word "may" is used in the section of the statute from the insurance code above quoted. That section provides that an insurance company "may be sued." The act construed in the *McMaster* case, *supra*, did not use the word "must," but provided that an action against a corporation "may be brought in any county," etc. If the word "may" as used in the statute, which was construed in that case, required the action to be brought in the proper county in order to confer jurisdiction, it would seem to follow that a like meaning must be given to the same word when it appears in the section of the insurance code which specifies the county in which an insurance company may be sued.

Some contention is made that the title of the insurance code is not sufficiently broad to include the section here in question. The title recites that it is

"An Act to provide an Insurance Code for the state of Washington, to regulate the organization and government

of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an Insurance Commissioner and define his duties, and to repeal all existing laws in relation thereto." Laws of 1911, p. 161.

The act supersedes and repeals all prior acts on the same subject, is a complete insurance code, and covers the entire subject of insurance. In *State ex rel. North Coast Fire Ins. Co. v. Schively*, 68 Wash. 148, 122 Pac. 1020, it was said:

"The act of 1911 is a complete insurance code. It covers the entire subject of insurance. It expressly supersedes and repeals all prior acts on the subject."

The word "code," as used in the title, means a systematic and complete body of law upon the subject to which it relates. *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382; 1 Bouvier, Law Dictionary (Rawle's 3d ed.), p. 507. This is the definition of the word as given by Bouvier:

"A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates."

The title of the act need not be an index to the body thereof, nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice; and the title is sufficient if it gives reasonable notice of the subject legislated upon. In *Maxwell v. Lancaster*, 81 Wash. 602, 143 Pac. 157, it was said:

"The general rules relating to titles of legislative acts with respect to expression of the subject-matter are well settled. The title need not be an index to the body of the act, nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice, and the title is sufficient if it gives reasonable notice of the subject legislated upon."

It seems reasonably clear that the title of the act is broad enough to include § 13½ of the insurance code, which covers the venue of actions on insurance policies and the manner of

serving process on insurance companies. The use of the word "code" in the title would indicate that the act was designed to regulate completely the subject to which it relates. It would be only reasonable to expect that an act of the legislature which was designed to completely regulate the subject of insurance would contain a provision relative to the venue of actions upon policies and the manner of service of process.

The judgment will be affirmed.

MORRIS, C. J., BAUSMAN, PARKER, and HOLCOMB, JJ., concur.

[No. 12940. *En Banc.* June 6, 1916.]

JESSIE McKINNEY *et al.*, *Respondents*, v. PORT TOWNSEND & PUGET SOUND RAILWAY COMPANY *et al.*, *Appellants*.[1]

RAILROADS—NEGLIGENCE—VIOLATION OF STATUTE. Failing to sound the bell or whistle continuously until a crossing is reached, as required by Rem. & Bal. Code, § 2528, is negligence as a matter of law.

SAME—INJURY AT CROSSINGS—SIGNALS — NEGLIGENCE — QUESTION FOR JURY. Whether a bell was rung continuously until a crossing was reached, is a question for the jury where several witnesses testified that they did not hear the bell, although the engineer and fireman and a passenger testified that it was rung.

SAME—INJURY AT CROSSINGS—NEGLIGENCE—EXISTENCE OF OBSTRUCTIONS. Where a building on the right of way at a crossing obstructs the view of the track, the existence of the obstruction is an element to be taken into consideration and imposes a like degree of care on the company and the public.

SAME — INJURY AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — EVIDENCE—SUFFICIENCY. The driver of an automobile is guilty of contributory negligence as a matter of law, in attempting to cross ahead of a train, where he had an unobstructed view of the track for 450 feet, after emerging from behind a building 18 or 20 feet from the track, the train was in view one to three hundred feet away, and he was going at a speed of between ten and fifteen miles an hour up grade on intermediate gear and could have stopped within five feet.

[1]Reported in 158 Pac. 107.

SAME—INJURY AT CROSSING—NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—QUESTION FOR JURY. Whether a train crew was guilty of negligence in not discovering an automobile stalled on a crossing in time to have stopped the train is a question for the jury, where it appears that the crossing was a dangerous one, that the automobile approached on the side of the fireman, who was not keeping a lookout and did not see it until the engineer applied the brakes, and the train stopped within 136 feet and 18 feet after passing the crossing, and the testimony was in conflict.

SAME—INJURY AT CROSSING—LAST CLEAR CHANCE—INSTRUCTIONS. In an action for wrongful death, when a train struck an automobile stalled on a crossing, an instruction on the doctrine of last clear chance is proper where the jury is told that the contributory negligence of the deceased must have culminated in the situation of peril from which by ordinary care on his part he could not extricate himself, and that the train crew, by the use of reasonable care, should have discovered the stalled automobile in time to have stopped the train.

FULLERTON and CHADWICK, JJ., dissent.

MORRIS, C. J., and MOUNT, J., dissent in part.

Appeal from a judgment of the superior court for Jefferson county, Ralston, J., entered January 4, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed.

Corwin S. Shank, *H. C. Belt*, and *Tom W. Holman*, for appellants.

A. R. Coleman and *Allan Trumbull*, for respondents.

ELLIS, J.—Action by the widow and minor children of James R. McKinney, deceased, for damages for his death as the result of a collision which took place on the afternoon of July 3, 1914, between an automobile driven by the deceased and a train operated by the defendant Port Townsend & Puget Sound Railway Company, upon a railroad which that company had leased from the defendant Port Townsend Southern Railroad Company. The place of the accident was at Junction Crossing, where the highway from Blynn to Port Townsend crosses the railroad track. The railway, from a

point between four and five hundred feet south of the crossing to a considerable distance north of the crossing, runs in practically a straight line a little east of north. The highway, at a point about five hundred feet northward from the crossing, approaches the railroad from a westerly direction to within about forty-six feet of the track, where it bends to a southeasterly direction and continues almost parallel with the railroad to within about forty feet of the crossing, when it makes a sharp turn across the railroad track and then extends northward on the other side of the track. Throughout all of this distance, the space between the highway and the railroad track is grown up with trees and bushes. Immediately south and west of the crossing, where the highway turns across the track, stands an old two-story frame building adjacent to the highway and extending up to within eighteen or twenty feet of the railroad track. This building belongs to and is used by the railroad company. The highway is lower than the railroad track, but gradually rising, and at a distance of about eighty feet from the crossing, rises at a grade of twelve and one-half per cent, which is maintained to the track. It appears from the map and a large number of pictures in evidence that, because of the building, trees, and brush on the railroad right of way, there was only a narrow space through which travelers on the highway, and for only a part of the distance between the point where it begins to parallel the railroad and the crossing, could get a view of the railroad track south of the crossing.

On the front seat of the automobile with the deceased, was the wife of his brother, J. E. McKinney, who, with Dayton Beveridge and Louis Jacobson, occupied the rear seat, Jacobson holding upon his lap a small child of J. E. McKinney. All of these had been over the road before, except Mrs. McKinney and Beveridge. A short time before reaching the crossing, both the deceased and his brother remarked that they were approaching the railroad crossing. J. E. McKinney testified:

"We didn't stop the car at any place up along that grade to see if there was a train coming. We didn't do anything more than keep a lookout for the train. The last grade is steeper than any of the rest. I think at the bottom of the pitch my brother threw his gear into intermediate. I spoke to all of them and told them there was a railroad crossing. I think my brother was looking for the train, and we were listening for the train."

Mrs. McKinney testified:

"As we were about half way up that grade approaching the railroad the deceased said 'We are coming to the junction,' and turned back to attend to the car and looked up the road. There was no more said; that was the last he spoke. It seemed to me that the grade was steeper just before we turned to the crossing. I noticed the building close to the track. I should think it would cut off the view from the track; as we approached it it seemed to me it did. I didn't see the railroad track to the south before getting up to within fifteen or twenty feet of it. I didn't hear any whistle or bell as we were coming up the grade."

Beveridge testified that he does not remember personally listening or looking for the train; that the first he knew of danger was J. E. McKinney calling to those in the automobile to jump. None of the occupants of the automobile saw or heard the train until after the automobile came from behind the building, eighteen or twenty feet from the track. The automobile ran forward onto the track, where, for some unaccountable reason, it stopped, stood for a few seconds, and was struck by the engine. Mrs. McKinney, J. E. McKinney, and Beveridge jumped in time to avoid injury. Jacobson was in the act of jumping when the shock of the collision threw him to the road and stunned him. The child remained in the automobile and was uninjured. The deceased received injuries from which he died the same evening. The train consisted of an engine and one passenger car. For a considerable distance beyond the curve to the south of the crossing, there is a slight down grade towards the crossing.

The train was allowed to drift down this grade without the application of steam.

It was charged that the defendants were negligent in failing to remove brush and trees from the right of way south of the crossing so that persons traveling on the highway could see trains approaching from that direction; in maintaining the house on the right of way on the westerly side of the railroad in a position to obscure the track to the south from persons approaching on the highway; in failing to blow the whistle and ring the bell as warning of the approach of the train; in operating the train with an inexperienced and incompetent fireman and engineer; in the failure of the engineer and fireman to see the automobile until the train was within one hundred feet of the crossing, and in failing to stop the train before the collision.

At appropriate times, motions for a nonsuit and for a directed verdict were interposed by the defendants. Both were overruled. The jury returned a verdict in favor of the plaintiffs for $20,000. The defendants' motion for a new trial was denied upon condition that the plaintiffs remit from the verdict the sum of $5,000. The condition being accepted, judgment was entered for the sum of $15,000 and costs. The defendants appeal.

Of the many claims of error, we find it necessary to consider at length but two: (1) Was the deceased guilty of contributory negligence? (2) If he was, did the court err in submitting the case to the jury on the doctrine of last clear chance?

In discussing the question of contributory negligence, we shall assume that the appellants' engineer and fireman were inexperienced and incompetent. A careful consideration of the evidence on that point convinces us that it presented a question for the jury. We shall assume that they were negligent in not sounding the bell or whistle continuously until the crossing was reached, as required by the statute, Rem. & Bal. Code, § 2528 (P. C. 135 § 551). Under a statute

couched in terms almost identical with ours, the supreme court of Montana has held that the failure on the part of a railroad company to observe the prescribed statutory precautions is negligence as a matter of law. *Hunter v. Montana Cent. R. Co.*, 22 Mont. 525, 57 Pac. 140. This court is definitely committed to the doctrine that a failure to observe a positive statutory duty is negligence *per se*. *Engelker v. Seattle Elec. Co.*, 50 Wash. 196, 96 Pac. 1039; *Wilson v. Puget Sound Elec. R. Co.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151.

Both the fireman and the engineer testified that the whistle was sounded only once and at a distance of twelve hundred feet from the crossing. As to whether or not the bell was sounded as the train approached the crossing, the evidence was conflicting. While the fireman and engineer and one passenger on the train testified that the bell was rung until the emergency brakes were applied about one hundred feet from the crossing, other witnesses who heard the whistle when the train was a quarter of a mile further away, and one of whom actually saw the collision, testified that they did not hear the bell at all. All of the occupants of the automobile said that they did not hear either the bell or the whistle. It is true that the evidence that the bell was not sounded was negative in form, but it was as positive in character as the nature of such a case will usually permit. It was sufficient to take the question to the jury. *Riley v. Northern Pac. R. Co.*, 36 Mont. 545, 93 Pac. 948; *Walters v. Chicago, M. & P. S. R. Co.*, 47 Mont. 501, 133 Pac. 357, 46 L. R. A. (N. S.) 702; *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.

We shall also assume that, owing to the building, trees and brush on the appellants' right of way in close proximity to this crossing, so as to obscure the view of the railroad track from the road north of the crossing, the deceased was not guilty of contributory negligence, as a matter of law, in

failing to discover the approach of the train until he passed up the incline from behind the building to within eighteen or twenty feet of the track. Whether the deceased was guilty of contributory negligence in failing to discover the approach of the train prior to that time was, under the evidence, a question for the jury. The court instructed the jury that the existence of this obstruction was an element to be taken into consideration in determining the degree of care to be exercised, and imposed a like degree of care on both the defendants and the public. The instruction was correct. *Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246; *Austin v. Long Island R. Co.*, 69 Hun (N. Y.) 67; affirmed in 140 N. Y. 639, 35 N. E. 892; *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112.

The evidence is conclusive that, when the automobile emerged from behind the building, eighteen or twenty feet from the track, there was an unobstructed view straight down the track for at least four hundred and fifty feet. It is certain that, at that time, any sort of observation on the part of deceased would at once have advised him of the approach of the train and of the necessity for stopping the automobile before reaching the track. That he was then aware of the necessity to watch for the train is evident from the fact that, while going up this incline, he remarked to his sister-in-law that they were approaching the crossing. His brother testified that he saw the locomotive when he was fifteen or twenty feet from the crossing and yelled, "Jump." The automobile went up the incline at a speed of *between ten and fifteen miles an hour*. It was running on the intermediate gear. It was shown by the testimony of two experienced drivers who were familiar with this crossing that an automobile running on an intermediate gear at a rate of fifteen miles an hour could readily be stopped on this grade in a distance of from five to seven feet. One of these witnesses said that it could be stopped in three feet, and easily in five feet. *There was no evidence to the contrary.* The greatest distance that any

witness placed the train from the crossing at the time the automobile came from behind the building was about three hundred feet. The other witnesses, who were in the automobile, placed the distance at about one hundred and fifty feet. The fireman and the engineer, who both claimed to have seen the automobile when it came up and stopped on the track, testified that the train was about one hundred feet from the crossing.

If the distance was even the greatest of these estimates, it was clear negligence on the part of the driver to attempt to cross on this up grade in front of the train. If the distance was one hundred and fifty or one hundred feet, then it was pure recklessness to attempt the crossing. The deceased was an experienced driver. It was his duty, as all the witnesses who testified on the subject say, and as common sense dictates, to have had his automobile under control in approaching this crossing, or even in making such a curve as this, had there been no crossing. While there was no positive or absolute duty to stop before starting up the incline in order to discover whether a train was approaching, there was a positive duty to be on the alert as the automobile proceeded. The railroad track was in itself a proclamation of danger which imposed a positive duty then to look for the train. *Smith's Adm'r v. Norfolk & W. R. Co.*, 107 Va. 725, 60 S. E. 56; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550; *Woolf v. Washington R. & Nav. Co.*, 87 Wash. 491, 79 Pac. 997; *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549; *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392. We must assume that he did so, and if he did, there can be no question that he saw the train immediately on emerging from behind the building, as others in the automobile did. When the train was discovered a short distance away, there was an absolute duty to stop and give it the right of way, if a stop was practicable; and the evidence was conclusive not only that a stop was practicable, but would have been

easy. The deceased took a chance instead of a precaution. We are constrained to hold, on the evidence now before us, that he was guilty of contributory negligence, as a matter of law, in attempting to cross in front of the train. The jury should have been so instructed. To hold otherwise would be to ignore the fact that the train had the right of way on its own track and that it was the duty of the traveler to accord it the right of way.

The appellants assert that there is no room under the evidence for the application of the doctrine of last clear chance, and that in any event the court's instruction on that subject was erroneous. The evidence shows that the automobile became stalled upon the track or, for some unaccountable reason, stopped just as the front wheels crossed the rail, and that it stood there for a period of about ten seconds before being struck by the engine. The brother of the deceased and Jacobson so testified, as did also a boy, Walter Moe, the only one not involved in it who saw the collision. Whether it did in fact stand for that or any appreciable length of time was a question for the jury. There can be no question but that, during whatever time it so stood, the automobile was in plain view of the fireman and engineer had they kept a proper lookout. Both of these testified that the automobile stopped upon the track when the train was about one hundred feet away, but both say it was then too late to stop the train in time to avoid the collision. The engineer testified that the deceased was then working at the levers of the automobile. It is only fair to assume that he was trying to start it. The brother of the deceased said that, when the car came from behind the building, he saw the train at least three hundred feet distant. Others in the automobile said that they first saw the train when it was about one hundred and fifty feet distant. If it was either of these distances, the evidence conclusively shows that, had the emergency brakes then been applied, the train would never have struck the automobile. The sand and marks upon the rails show that the emergency

brakes were applied one hundred and eighteen feet from the crossing, and that the engine stopped eighteen feet after clearing the crossing. It was thus actually stopped in a distance of one hundred and thirty-six feet. From the evidence, it can hardly be doubted that the occupants of the automobile saw the train before either the engineer or the fireman saw the automobile. It is evident, also, that the fireman, whose station was on the left-hand side of the cab, had he been looking, would have seen the automobile at the time that its occupants saw the train. This crossing was known to be a dangerous one. It was the imperative duty, both of the fireman and engineer, to keep a lookout as the train approached it. The fireman admitted that he did not look out at all until he was advised of danger by the engineer applying the brakes. Whether the automobile was actually stalled, or deceased by some mistake threw out the gear and stopped the car on the track and could not start it again in time to save himself, is immaterial on this phase of the case. In either event, the negligence of the deceased had culminated in a condition of danger from which the exercise of due care on his own part could not thereafter extricate him. The sole question therefore is, Could the engineer or fireman, by keeping a proper lookout, have seen the car standing in time to have avoided striking it? On that point, the evidence and the reasonable inferences to be drawn from it were in the sharpest conflict. The question was clearly one for the jury. *Bemiss v. Puget Sound Traction, Light & Power Co.*, 89 Wash. 239, 154 Pac. 171; *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934, 48 L. R. A. (N. S.) 640; *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534. The appellants seem to recognize this, since they requested an instruction on the subject. They made no specific request that the question of last clear chance be taken from the jury. The court gave the following instruction:

"The jury are instructed that if you find from the evidence in this case that the deceased, James R. McKinney, was guilty of negligence in driving said automobile onto the railroad crossing, and that said automobile in some way became stalled or hung on said crossing, so that said McKinney *was unable to go across the track, and that while in such dangerous position and unable to extricate himself therefrom,* the engineer and fireman on defendants' train *saw* the automobile stopped on the crossing in time to have stopped the train by the use of reasonable diligence and skill on their part before reaching said crossing and did not do so, or if you find that said engineer and fireman by the use of reasonable diligence and watchfulness on their part *should have discovered* said stalled automobile on the crossing in time to have stopped the train by the use of reasonable diligence and skill before reaching the crossing and did not do so, then in either event defendants are guilty of such negligence as to render them liable for the killing of said James R. McKinney, if he was killed by defendants' train, regardless of said McKinney's negligence, in going upon said crossing in the first place, the law being that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first at fault, is the sole proximate cause of the injury. Stated otherwise, the law is that where both parties are negligent, the one that has the last opportunity to avoid accident, notwithstanding the negligence of the other, is solely responsible for it, his negligence being deemed the direct and proximate cause of it."

Appellants contend that this instruction was erroneous under the rule announced in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916 A. 943, where we said:

"Assuming that a traveler has negligently placed himself in a dangerous situation upon the highway, then, as we have seen, whenever the person in control of such agency actually sees the traveler's situation and should appreciate his danger, the last chance rule applies, without regard to the continuing negligence of the traveler concurring with that of the operator up to the very instant of the injury. A second situation to which the rule applies is this: Where the person in control of such agency, by keeping a reasonably careful lookout

commensurate with the dangerous character of the agency and the nature of the locality, could have discovered and appreciated the traveler's perilous situation in time, by the exercise of reasonable care, to avoid injuring him, and injury results from the failure to keep such lookout and to exercise such care, then the last chance rule applies, regardless of the traveler's prior negligence, whenever that negligence has terminated or culminated in a situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him. This last phase of the rule applies whenever injury results from new negligence or from a continuance of the operator's negligence after that of the traveler has so ceased or culminated."

It is urged that the above instruction was erroneous in that it did not tell the jury that, before the second phase of the doctrine of last clear chance as defined in the *Mosso* case could apply, the jury must, from the evidence, find that the negligence of the deceased had culminated in the situation of peril from which the exercise of ordinary care on his own part would not thereafter extricate him. While not expressed in the language suggested in the *Mosso* case, the words which we have italicized in the instruction given do express the same thought. No such thought was expressed in the instruction held erroneous in the *Mosso* case.

Counsel base an argument upon the failure of the instruction which we have quoted to condition the application of the rule upon a finding that the engineer not only *could have seen*, but *should have appreciated* the traveler's perilous situation. In our opinion in the *Mosso* case, that condition was included, and we are satisfied that, in strict accuracy, it should be included in any case. Here, however, if the engineer or fireman had actually seen the automobile at a standstill on the track in time to stop, they could not have failed to appreciate the danger and necessity for stopping the train. Whether they did see the automobile come to a standstill in time to stop, or by the exercise of a reasonably careful lookout could have seen it in time to stop, were plainly, under

the evidence in this case, questions for the jury. Though the case must be tried again, we shall not discuss the various assignments of error addressed to other instructions given. What we have said sufficiently disposes of them.

Of course on a new trial every question of fact will be open for trial on evidence then adduced.

The judgment is reversed, and the cause is remanded for a new trial.

BAUSMAN, HOLCOMB, PARKER, and MAIN, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing opinion. The statute makes it a penal offense for an engineer driving a locomotive on any railway to fail to sound the whistle at least eighty rods from any place where the railway crosses a traveled road, or to continue to sound such whistle or ring the bell until such crossing be passed. It is conceded in the record that but one blast of the whistle was blown when the crossing where the accident occurred was approached, and it is a disputed question whether the bell was rung at all. It is a matter of common knowledge that the ordinary signal for a grade crossing is two long and two short blasts of the whistle, and that one blast indicates an approach to a station and a slowing up of the speed of the train, if not a full stop. The evidence, therefore, discloses not only that the operators of the train were negligent in approaching this crossing, but gave signals that were actually misleading. It is in evidence also that the train was three hundred feet away when the automobile reached the railway track, and that both the train and the automobile were traveling at the same rate of speed. This being so, the automobile had time not only to cross the track before the train reached the crossing, but to get nearly three hundred feet away before the train would actually reach it. I can see no reason, therefore, for holding, as a matter of law, that the driver of the automobile was negligent in attempting to cross the track ahead of the train. To my mind,

it was clearly a question for the jury, and that the trial court very properly submitted the question to them. The judgment should be affirmed.

CHADWICK, J., concurs with FULLERTON, J.

MOUNT, J. (dissenting)—It is apparent that the deceased drove his automobile onto the railroad track immediately in front of the oncoming train; at any rate, when it was only ten seconds away. This was the proximate cause of his death, for which he alone was responsible. The action should be dismissed for that reason.

I therefore dissent.

MORRIS, C. J., concurs with MOUNT, J.

[No. 13070. Department Two. June 6, 1916.]

BEULAH BOWERS, *Respondent*, v. STANDARD FUEL & ICE COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—INJURY TO PEDESTRIANS—ICE WAGON—NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether an ice deliverer was guilty of negligence in placing a two hundred pound piece of ice in the delivery wagon in such a position that, after delivery of pieces holding it in place, it was liable to shake loose in driving over rough ground, and did so, striking a child in the street.

SAME—PEDESTRIAN OR TRESPASSER—QUESTION FOR JURY. The fact that a child had been a trespasser on the step of an ice wagon does not prevent recovery for injuries received after she had left the wagon and her status as a traveler had been resumed, and such fact is a question for the jury, where the evidence was conflicting.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A recovery of $3,000 for injuries sustained by a child eight years of age, struck by a piece of ice falling from an ice wagon, is not excessive, where it appears that two bones of the leg were broken, the flesh badly cut, necessitating many stitches, and five weeks in the hospital, and resulting in an ugly scar and a reduced size of the leg.

[1]Reported in 157 Pac. 1094.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 15, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Lawrence Jack and *H. M. Stephens*, for appellant.

Robertson & Miller and *E. W. Robertson*, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries, alleged to be chargeable to the negligence of the defendant. The plaintiff, at the time of the accident, was a little girl, approximately eight years old, and brings the action by her guardian *ad litem*. The trial of the cause resulted in a verdict in favor of the plaintiff for the sum of $4,000. Motion for a new trial being made and presented, the trial court entered an order directing that the plaintiff elect to remit $1,000 from the amount of the verdict, and if this were not done, a new trial would be ordered. Thereafter the plaintiff elected to take a judgment for the sum of $3,000, which was entered. From this judgment, the defendant appeals.

The facts, which are either not in dispute or from the evidence the jury had a right to find, are substantially these: On July 22, 1914, the appellant was engaged in the business of selling and delivering ice in the city of Spokane. For this purpose a wagon drawn by two horses and accompanied by two men was used. The wagon was covered, and the sides of the box were approximately five feet high and eight feet long. In the rear of the wagon there was a tail gate about eight or ten inches high. The wagon bed set upon springs. At the back end of the wagon there was a step bolted to the frame. This step was about two and one-half feet long, and approximately fifteen inches wide.

On the morning of the day mentioned, before starting on the forenoon deliveries, the wagon was loaded by the two men in charge with nine cakes of ice, each cake being about

three and one-half feet long, twenty-two inches wide, ten inches thick, and weighing about three hundred pounds. In loading the wagon, six cakes were set crosswise of the bed on edge, and two were put on the end gate. Then about two-thirds of a cake, which had been broken, was laid in the front end of the wagon on top of the other ice. The other one-third of the broken cake was put in the back end on the ice that was leaning on the end gate. With the wagon thus loaded, the morning deliveries were begun.

During the course of the forenoon, while the regular deliveries were being made, the wagon passed through an alley in the rear of the plaintiff's home. Either some place in this alley, or just before entering it, a stop had been made for the purpose of delivering ice to a customer. After the men had gotten upon the seat preparatory to starting, and without their knowledge, the plaintiff and a little boy about the same age got upon the wagon and seated themselves upon the step at the rear. The wagon passed through the alley with the horses going at a slow trot. As it passed from the alley into the street, as one witness described it, there was a "go down and go up." After reaching the street, which was graded but not paved, the wagon turned south.

About the time the wagon passed from the alley into the street, the little boy jumped off. The plaintiff remained until the wagon had gotten a short distance into the street, when she left the step of the wagon and started for her home, having taken a few steps, and having traveled approximately five or six feet, when the two hundred pound piece of ice which had been placed upon the other ice in the front of the wagon slid out of the wagon and struck her on the inside of the left leg, breaking the smaller bone and fracturing the larger. The flesh of the leg was cut to the bone from a point about four inches above the ankle to a little below.

When the ice cake was placed on top of the other ice at the time of loading, there was sufficient frost in it so that it would have a tendency to freeze and hold its place. The

wagon passing over the rough ground would have a tendency to shake it loose. At the time of the accident, the two pieces of ice which had been set against the tail gate had been consumed in the deliveries made up to that time, with the exception of about one hundred and fifty pounds. When these cakes were placed in that position in the full size, they operated to prevent the ice from sliding out of the wagon. At the time of the accident, there was nothing to prevent the cake of ice laying on top in front, if it should be jarred loose, from sliding out of the wagon to the rear.

In the trial court, the appellant challenged the sufficiency of the evidence and moved the court for a directed verdict. This motion was denied. The cause was submitted to the jury, and a verdict returned as above indicated.

The first question is whether the defendant was negligent in loading the ice wagon with the two hundred pound piece on top in front, and then driving the wagon over rough ground in such a manner that it would be shaken loose and slide out of the rear. The driver knew the condition of the alley and the approach to the street over which he had driven just prior to the accident, having frequently passed that way. He knew also that the shaking of the wagon might cause the ice cake to loosen and slide out. He further knew that, if the cake did slide out, it might hit a person properly on the street and cause injury.

It cannot well be held, as a matter of law, that the defendant was not negligent. Whether reasonable care had been exercised, and whether such an accident as occurred might be reasonably anticipated as the probable result of loading and driving the wagon in the manner stated, were for the jury to determine.

The next question is whether a recovery can be had even though there was negligence on the part of the appellant. It will be assumed, but not decided, that if the respondent was upon the step at the rear of the wagon at the time she was hit by the ice cake, and was thus a trespasser, under no

theory of the law could there be a recovery, in the absence of wanton or willful injury. In this case there is no evidence from which wanton or willful injury could be inferred.

There was evidence that the respondent, at the time she was struck by the ice cake, had gotten off of the step, had started for home, with her back towards the wagon, and had gone a few steps, five or six feet, when the ice cake slid out of the wagon and struck her. There was evidence which would controvert this and tend to show that she was on the step at the time she was struck. The fact that she was a trespasser while upon the step would not deprive her, as a matter of law, of the right to recover if her status as a traveler had been resumed.

There has been something said relative to the physical facts showing that respondent must have been hit while upon the step. Whether the cake of ice in sliding out would drop upon the step, or would shoot out some distance behind and hit the ground, would depend upon its weight and momentum, together with what influence the road and the wagon may have had upon it. There is no physical law by which it can be determined under the facts in this case whether the ice cake would necessarily drop upon the step, or whether it would shoot out behind some distance. One witness testified that if the ice slid with much speed, it would likely hit the ground five or six feet from the wagon.

Whether the respondent, at the time of the injury, was a trespasser upon the step, or whether her status was that of a traveler upon the street, was for the jury to determine. In *Jaehnig v. Ferguson & Co.*, 197 Mass. 364, 83 N. E. 868, the plaintiff, a boy ten years of age, was run over and injured on one of the public streets of Boston by a delivery wagon in charge of one of the defendant's employees. The plaintiff had been playing ball in the street in violation of an ordinance, and there was evidence tending to show that one of his movements in the game brought him in collision with the team, and was a contributing cause of the accident.

And, on the other hand, there was evidence that he had been called by his father, and at the time of the accident had given up the game and was on his way to his father's shop nearby. He had started walking in the direction of his father's shop, which was also in the direction of the ball, a few feet away, and was struck by the wagon before he had gone so far as the place where the ball was. It was there held that it was a question of fact for the jury to determine whether he had given up the game before he started to take the three or four steps which brought him in collision with the wagon. If he had not given up the game, he was playing ball in violation of an ordinance, and could not recover. If he had given up the game, and was starting to his father's shop in response to the call, he was a traveler upon the street.

It would be difficult to distinguish that case in principle from the case here presented. While that case, of course, is not controlling in this jurisdiction, we may say that the principle there announced seems reasonable and just.

Apparently there are not many cases in the books where an injury has occurred by reason of the fact that a cake of ice has slid out of a wagon and injured a traveler upon the street; but through the industry of counsel a few such cases have been cited; these will now be noticed.

In *Walsh v. Hayes*, 72 Conn. 397, 44 Atl. 725, a child five years old was injured by a cake of ice which was jolted out of an ice wagon while the horses were trotting up hill. In that case the child was either upon the wagon or was in the act of alighting when the cake of ice struck him. The case is written upon the theory that the child, at the time of the accident, was "hanging onto the tail end of the defendant's ice wagon." In that case a recovery was denied. The cause had apparently been tried to the court without a jury. It was there said:

"It was for the trial court to determine, in view of all the attending circumstances, whether a wagon so heavily loaded could be hauled at such a rate of speed over a rough stone

crossing, with due regard to the rights of those who might be found upon the highway."

That case, so far as it has any bearing, would tend to support the position that the question of negligence was one of fact and not of law.

In *Conlon v. Bailey*, 58 Ill. App. 261, the plaintiff, a child four or five years of age, climbed upon the step at the rear of an ice wagon, and while there a large block of ice slid out, falling on him and causing the injury for which the action was brought. It was there held that no recovery could be had. The court, however, observed:

"Had the block fallen upon one crossing the street, or walking behind the wagon, the duty so to use the street as not to injure others using it, would raise a question not in this case. And it is no answer to say that the boy might have been injured when on the street behind the wagon, as severely as when on the step."

In *Barry v. Stevens*, 206 Mass. 78, 91 N. E. 997, the plaintiff was injured by a cake of ice sliding out of an ice wagon. She had gotten upon the step at the rear, and in consequence of the jolting of the wagon, she became apprehensive that her position was unsafe, and jumped off, and coincidently the cake of ice slipped from one of the tiers and struck her below the knee as she alighted on the sidewalk. Recovery in that case was denied because "the accident happened when she was preparing to resume the character of a traveler, and before the relation as between the parties had been established by any use of the street for that purpose." The court in that case remarked:

"If the plaintiff when injured was a traveler on the highway as alleged in the declaration, there was evidence for the jury of her due care, and of the defendant's negligence."

Finally, it is contended that the verdict, even as ordered reduced by the trial court, is still excessive, and for that reason a new trial should be granted. The smaller bone of the leg was broken; the larger bone was fractured; a gash

four inches long was cut in the flesh, which necessitated the taking of many stitches. The respondent was in the hospital for five weeks; and on account of the fact that dust and dirt got into the wound at the time of the accident, there was more or less infection, making it necessary that the leg be dressed twice a day for a time. The evidence also showed that an ugly scar would be left on the leg, and that it was, at the time of the trial, slightly smaller than the other leg. Prior to the accident the child had been a strong and healthy child, and since the accident had had a tendency to nervousness. It is true that, so far as reducing the fracture of the bones is concerned, a perfect result was obtained. It does not seem to us that we would be justified in ordering a further reduction in the amount of the recovery, or in the alternative a new trial.

The judgment will be affirmed.

HOLCOMB, PARKER, and FULLERTON, JJ., concur.

MORRIS, C. J., took no part.

[No. 13095. Department Two. June 6, 1916.]

C. E. BARTHOLOMEW, *Appellant*, v. THE TOWN OF SPRINGDALE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—OFFICERS — SALARY — QUALIFICATION — BOND—APPROVAL. Failure of the council to approve the bond of one appointed and acting as town marshal does not prevent his becoming an officer *de jure* and entitled to the salary, no other person being appointed or serving during the term; especially since Rem. & Bal. Code, § 7722, merely requires the marshal to execute a bond to the town before entering upon his duties and not that bond shall be approved by the council before entering upon his duties; the bond having been delivered to the clerk and never rejected.

OFFICERS—SALARY—DE JURE OFFICER—QUANTITY OF SERVICES. The right of a *de jure* officer to his salary is not affected by the quantity of the services rendered, in the absence of an abandonment of the office.

Appeal by plaintiff from a judgment of the superior court for Stevens county, Jackson, J., entered January 25, 1915, upon the verdict of a jury rendered in favor of the plaintiff, allowing partial recovery in an action to recover a salary. Reversed.

Jesseph & Bourland, for appellant.

J. B. Slater and *Carey & Johnson*, for respondent.

PARKER, J.—The plaintiff, C. E. Bartholomew, seeks recovery of the sum of $720 from the defendant, Town of Springdale, which he claims as the salary attaching to the office of marshal of the town while he was the incumbent of that office for the period of one year. Trial before the superior court of Stevens county sitting with a jury resulted in verdict and judgment for the sum of $300, from which the plaintiff has appealed to this court.

Counsel for appellant contend he is entitled to have judgment rendered in his favor for the full amount of salary claimed by him, and that the trial court erred in refusing to

[1]Reported in 156 Pac. 1090.

so rule, as a matter of law, upon motion made by his counsel for a directed verdict immediately following the announcement of counsel for respondent that they rested their case.

We note that, after the denial of this motion by the court, some rebuttal evidence was introduced in appellant's behalf, and also some sur-rebuttal evidence introduced in respondent's behalf; but none of this additional evidence, as we view it, had any bearing whatever upon the undisputed facts which we regard as determinative of the question of whether or not appellant is entitled to judgment as a matter of law, as in effect asked for in his motion for directed verdict. Therefore, if the trial court committed error in refusing to direct a verdict in appellant's favor when requested so to do, such error was not cured by anything appearing in the rebuttal and sur-rebuttal evidence introduced thereafter.

The undisputed facts determinative of appellant's right to judgment as a matter of law may be summarized as follows: On February 3, 1912, the mayor of the Town of Springdale appointed appellant marshal of the town. This appointment was evidenced by a communication addressed to appellant by the mayor stating "I hereby appoint you town marshal of the Town of Springdale, Wash." This appointment was unqualified by other language and is silent as to the time it became effective, so far as the giving of bond and taking of the oath of office by appellant is concerned. At that time, there was in force in the town an ordinance fixing the salary of the town marshal at $60 per month, and there was also at that time in force an ordinance fixing the amount of the official bond required to be furnished by the town marshal at $300. On the same day, appellant executed and deposited with the town clerk his official bond in the sum of $300, conditioned as the ordinance and Rem. & Bal. Code, § 7722 (P. C. 77 § 371), require. The bond was executed by two sureties with appellant, who, by affidavit in due form indorsed thereon, stated they were each worth $600 over and above

all liabilities, in separate property situated within the state not exempt from execution. There was also indorsed upon this bond appellant's oath of office in due form, sworn to before a notary public. Some controversy arose as to whether or not this bond was formally approved by the town council as required by Rem. & Bal. Code, § 7722. The evidence upon this question was rejected, however, by the trial court, evidently because the approval claimed by appellant to have been had was at a meeting of the council where there was not a quorum of qualified members of the council present. We will therefore proceed as though the town council never formally approved the bond by proper evidencing of such approval upon their minutes or by indorsement upon the bond. From that time until February 3, 1913, no other person was appointed to the office of marshal. During all this period of one year, appellant claimed and held himself out to be marshal of the town, and at least in some substantial measure performed the duties pertaining to that office. There is some conflict in the evidence as to the extent of such performance, but that no one else was legally authorized to perform or performed such duties is certain. We may add that appellant had possession of the personal property of the town used by the incumbent of the office, such as star, handcuffs, club, etc. It also inferentially appears that he had possession of the town jail. It is undisputed in any event that he put persons in the jail, assuming in doing so to act as marshal.

Rem. & Bal. Code, § 7722, relating to the qualifications of officers of towns of the fourth class, to which class the town of Springdale belongs, so far as necessary to here notice the provisions thereof, reads:

"The clerk, treasurer, and marshal shall respectively, before entering upon the duties of their respective offices, execute a bond to such town in such penal sum as the council by ordinance may determine, conditioned for the faithful performance of his duties; . . . such bonds shall be approved

by the council. . . . Every officer of such town, before entering upon the duties of his office, shall take and file with the clerk the constitutional oath of office."

It is plain from a reading of this section that appellant in receiving his appointment, depositing with the town clerk his bond and oath of office, and the entering upon his duties as marshal, became an officer *de jure* with all the powers and entitled to all the emoluments of the office, unless we are to hold otherwise because of the fact that his bond was not formally approved by the town council. That the failure on the part of the council to formally approve his bond did not prevent him from becoming an officer *de jure*, we think is determined by the decision of this court in *State ex rel. Chealander v. Carroll*, 57 Wash. 202, 106 Pac. 748. The office there involved was civil service commissioner of the city of Seattle. Chealander, the appointee, did not then, nor thereafter, give and file the bond required by the city charter before entering upon the duties of such office. Touching the question of whether or not Chealander was a *de jure* or merely a *de facto* officer, Justice Fullerton, speaking for the court, at page 208 of the decision, said:

"The failure to give a bond does not render an officer duly elected or appointed a *de facto* officer. He is a *de jure* officer holding by a defeasible title. *Foot v. Stiles*, 57 N. Y. 399. The giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the officer's authority to act, unless especially made so by statute. *Glavey v. United States*, 182 U. S. 595. The courts generally hold that, even though the statute expressly provides that, upon a failure to give a bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, the default is a ground for forfeiture only, not forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure* having relation back to the time of his election or appointment."

The earlier decision of *State ex rel. Lysons v. Ruff*, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140, lends support to this view.

Now, § 7722, above quoted, requires only that the marshal shall "*execute a bond to such town*" before entering upon the duties of his office, not that such bond shall be approved by the council before entering upon the duties of his office. Manifestly, then, when appellant so executed and delivered to the town clerk his official bond, sufficient upon its face as to form and qualification of sureties, as this bond plainly was, he had performed every duty required of him by § 7722 as a prerequisite to his right to enter upon the duties of his office. Plainly the delivery to the town clerk was a delivery to the town, and also a delivery to the council for its approval. It is not claimed that the council ever affirmatively rejected this bond or demanded of appellant another or different bond. It may be that the council could have required another bond, so far as the sufficiency of the sureties are concerned, and that the failure on the part of appellant to furnish a bond such that the qualifications of the sureties would meet the council's approval would be cause for his removal from the office of marshal; but that is foreign to the question of appellant then being the lawful incumbent of the office of marshal. It seems quite clear to us that appellant was, during the year for which he claims salary, the marshal *de jure*.

It seems plain from the authorities that the quantity of service rendered by a *de jure* officer, or even the question of neglect to render the official services required of him, in any event when such failure falls short of an actual abandonment of the office, is wholly immaterial to the question of his right to the salary or compensation which the law attaches to the office; this, manifestly upon the theory that the question of his right to compensation is not a question of contract. The question was considered learnedly and at some length in the supreme court of Iowa in *Bryan v. Cattell*, 15 Iowa 538.

That case involved an attempt to collect salary by a district attorney from the state, the auditor declining to issue the warrant therefor because of his absence from the state and neglect of the duties of that office. Recognizing the possible wrong and injustice to the state, but there being no statute providing for the deduction or forfeiture of salary for the cause which there appeared and which might be considered as morally entitling the state to resist payment of the salary, the court observed, on page 552, as follows:

"It must be remembered, however, that we are dealing with a practical, and not an abstract, question. And practically, the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn. That is to say, how long an absence from official duties—how great delinquency shall work a forfeiture of salary. In the absence of statute, shall it be one day, or one week, or one month, or one year? Where shall faithfulness end, and delinquency begin? Add to these considerations the fact, that it is frequently impossible to tell to what extent the services of the officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the state takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

The reason of this doctrine is rendered evident by the general rule stated in Throop on Public Officers, in § 443, as follows:

"It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the state, or the municipality by which it is payable. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office."

See, also, Mechem, Public Officers, § 855, and 29 Cyc. 1423.

The undisputed facts which bring this case within this doctrine are: Appellant's appointment, his bond and official oath on file with the town clerk, which are record facts; and also the undisputed fact that appellant held himself out and assumed to act as town marshal, having possession of such property of the town as usually attaches to such an office. The conflicting evidence has only to do with the extent of the official duties performed by appellant as town marshal, but even as to that, there is no evidence in this record tending to show that he neglected to perform all such duties as he was called upon to perform or that were necessary for him to perform.

We cannot escape the conclusion that appellant was the town marshal *de jure* and, as such, entitled to the salary which by law attached to that office during the year claimed, that he was entitled to the ruling for an instructed verdict as asked for when respondent rested its case, and that the rebuttal and sur-rebuttal evidence thereafter introduced did not cure the error of the court in denying appellant's motion for a directed verdict.

Some claim is made in appellant's complaint touching the matter of interest upon his unpaid salary. The question is not, however, presented here by either argument or citation of authority. We therefore give it but passing attention without assuming to lay down any rule of law relative to cases of this kind, and conclude that appellant is entitled to interest upon his year's salary of $720 at the legal rate of six per cent from the 13th day of September, 1913, the date of filing his complaint in this action. He may be technically entitled to interest commencing at an earlier date, but under all the circumstances, we conclude to fix this as the date of the commencement of his interest.

The judgment is reversed, and the cause remanded to the superior court with direction to enter judgment in appel-

lant's favor and against respondent for $720, with legal interest thereon from September 13, 1913.

MORRIS, C. J., MAIN, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13188. Department One. June 6, 1916.]

B. YANASE, *Respondent*, v. SEATTLE TAXICAB & TRANSFER COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—ACCIDENTS AT CROSSINGS—ORDINANCES—RIGHT OF WAY. A pedestrian waiting to board a street car stopping at a street intersection, need not be exactly upon the crossing to be within the rule of an ordinance giving pedestrians the right of way at street crossings; and is shown to be approximately on the crossing where it appears that he was from eight to thirty feet east of the northeast curb of a street corner.

TRIAL—INSTRUCTIONS—AS A WHOLE. An instruction founded upon a pedestrian's right of way at a street crossing under a city ordinance, must be read in connection with other instructions giving vehicles the right of way between crossings, as the instructions must be considered as a whole.

Appeal from a judgment of the superior court for King county, Ralston, J., entered May 4, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a taxicab. Affirmed.

F. E. Brightman and *Arthur E. Campbell*, for appellant.

Charles H. Miller, for respondent.

FULLERTON, J.—Respondent was struck by one of appellant's taxicabs, and brought this action to recover damages for personal injuries thereby sustained. This appeal was taken from a verdict in respondent's favor.

On the night of November 12, 1914, respondent was standing on the northeast corner of Jackson street and Eighth

[1]Reported in 157 Pac. 1076.

avenue, in Seattle, awaiting the approach of a street car which was going west on Jackson street. As the car neared the corner upon which he was standing, respondent, after looking in both directions for other approaching vehicles and seeing none, stepped at a right angle to the curb to board the street car. He proceeded several feet into the street, and the car having stopped a few feet west of where he was waiting, he took several steps in that direction, when he was struck by appellant's taxicab, which was also proceeding west on the north side of Jackson street.

Appellant's only complaint is with regard to certain instructions. The first of these are as follows:

"A pedestrian crossing a public street at a public crossing is, by the ordinance of the city of Seattle, in the absence of a clear and plain warning not to do so, entitled to the right of way, and cannot be held liable for failure to observe continuous and extraordinary care and observation to avoid vehicles using such street when the street is open and unobstructed, and the driver or drivers of such vehicles have equal opportunity to observe and notice pedestrians using said crossing at the time."

"If you find that the plaintiff was, on the 12th day of November, 1914, crossing Jackson street, at a public crossing, to board a street car running upon said street, and had, previous to attempting such crossing, received no notice or warning of, or danger from, the immediate approach of defendant's taxicab, the plaintiff had the right of way upon such crossing, and, in the absence of such previous warning, was not required to exercise continuous observation to ascertain or discover the approach of such taxicab to avoid collision with the same, but it was the duty of the driver of the taxicab, in approaching a crossing where street cars stopped to discharge or receive passengers, to avoid collision with all persons using such crossing for the purpose of boarding such street cars."

Appellant concedes these instructions correctly state the law as applicable to street crossings, but contends they are prejudicial for the reason that there is no evidence showing the accident occurred on a street crossing. We cannot agree

with this contention. A photograph of the intersection of the streets was introduced in evidence, upon which respondent marked where he stood while waiting for the car, and this shows him to have been approximately on the crossing. The testimony showed that he was from eight to thirty feet east of the northeast curb of Eighth avenue, which would place him upon or very near the crossing, and under the authority of *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903, it was not necessary that he be exactly upon the crossing. At the close of respondent's case, it was stipulated by counsel, and the stipulation was read to the jury, that, under an ordinance in force at the time of the accident, an automobile or vehicle has the right of way at all points between street intersections, while a pedestrian has the right of way at street crossings. This stipulation shows, at least to some extent, the theory upon which the case was tried. We are clearly of the opinion that there was sufficient evidence to make the question whether or not the accident occurred at the street crossing one for the jury.

The following instruction is also complained of:

"If you find that the plaintiff, in attempting to cross Jackson street to board a street car, received no notice or warning of immediate danger from the approach of defendant's taxicab, and the street was open and unobstructed, and the driver of the taxicab had equal opportunity for observation with the plaintiff, the duty of continuous observation was imposed upon the driver of the taxicab, and the defendant is liable whether the driver, after the plaintiff began such crossing, gave notice or warning of his approach or not; and if you also find that the plaintiff so used reasonable care in attempting such crossing, and said taxicab was being driven and was approaching at an unlawful rate of speed, the defendant is liable irrespective of any warnings given by the driver of such taxicab after plaintiff had attempted to make such crossing."

Appellant contends this instruction does not limit that part of Jackson street respondent might cross and still be pro-

tected by the rule that the pedestrian had the right of way. Possibly this criticism has merit when the instruction is read without regard to the other instructions given, but in view of the court's entire charge, which must be considered, it is clearly without prejudice to the rights of appellant. After giving the above instruction, the court instructed the jury that the rights of appellant's taxicab between street crossings were superior to those of respondent, and that if respondent did not give way to its superior right when between crossings, their verdict must be for appellant.

As we find no error in the record, the judgment is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12966. Department Two. June 7, 1916.]

WILLIAM HOLZMAN, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

STATUTES—TITLE AND SUBJECTS. The title "an act relating to local improvements, and repealing" certain acts is sufficient to embrace a section regulating the procedure in actions to foreclose liens for local assessments; the term "local improvements" being inclusive of the subject of local assessments.

SAME. The restrictions of 3 Rem. & Bal. Code, § 7892-40, upon the rights of lien holders of certificates of delinquency for general taxes, requiring them to pay all outstanding local assessments, is germane to the title of the act—"An act relating to local improvements."

SAME—TITLE AND SUBJECTS—AMENDMENTS. 3 Rem. & Bal. Code, § 7892-40, of the local improvement act, which requires lien holders of certificates of delinquency for general taxes to pay outstanding local assessments, is not unconstitutional as amending or revising 2 Rem. & Bal. Code, § 9262, permitting such lien holders to foreclose tax certificates upon paying accrued general taxes only, without setting out in full the section amended, as required by Const., art. 2, § 37.

[1]Reported in 157 Pac. 1086

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 21, 1915, upon findings in favor of the plaintiff, in an action to foreclose a delinquency certificate, tried to the court. Reversed.

H. M. Stephens, *Ernest E. Sargeant*, and *Dale D. Drain*, for appellant.

Post, *Avery & Higgins*, for respondent.

PARKER, J.—The plaintiff, William Holzman, seeks foreclosure of a certificate of delinquency for general taxes due upon a lot in the city of Spokane, issued to him by the treasurer of Spokane county. The city of Spokane, as well as the owner of the lot, was made a defendant because it has liens upon the lot for local assessments levied to pay the cost of street improvements. The validity of these liens is not questioned by counsel for plaintiff, but they contend that he is entitled to foreclose his general tax certificate of delinquency as a superior lien to that of the local assessment liens without being required to proceed as prescribed by that portion of the local improvement law which reads as follows:

"The holder of any certificate of delinquency for general taxes shall, before commencing any action to foreclose the lien of such certificate pay in full all local assessments or instalments thereof outstanding against the whole or any portion of the property included in such certificate of delinquency, or, he may elect to proceed to acquire title to such property subject to certain or all local assessments a lien thereon, in which case the complaint, decree of foreclosure, order of sale, sale, certificate of sale and deed shall so state." Laws 1911, p. 467, § 40 (3 Rem. & Bal. Code, § 7892-40).

This law was in force when the plaintiff acquired his delinquent certificate on September 7, 1911. The superior court rendered judgment of foreclosure as prayed for by plaintiff, decreeing sale of the lot to satisfy the general taxes, and that the assessment liens thereon held by the city, as well as all interest of the owner therein, be forever barred

and foreclosed by such sale and the issuance of the tax deed thereon. From this disposition of the case, the city has appealed to this court.

Counsel for respondent contend, and the trial court decided, that the above quoted portion of § 40 of the local improvement law of 1911 is unconstitutional and of no effect because of the violation, in its enactment, of §§ 19 and 37 of art. 2 of our constitution, reading as follows:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

The local improvement law of 1911 containing the above quoted provisions in § 40 thereof, looking to the enforcement of local assessment liens and in effect making them of equal rank with general tax liens when the latter has been transferred by the county to private individuals, is a general law complete within itself upon the subject of local improvements, including local assessments and the liens thereof, and purports to cover the whole subject-matter of which it treats. Its title reads:

"An act relating to local improvements in cities and towns, and repealing certain acts and parts of acts." Laws of 1911, page 441.

This title, it is insisted by counsel for respondent, does not sufficiently express the subject-matter included in the provisions of § 40 above quoted. This court has always liberally construed the constitutional requirement that the subject-matter of an act of the legislature shall be expressed in its title, and has deferred to legislative discretion touching that requirement, except in cases of its plainest violation. The doctrine that all reasonable doubts as to the constitutionality of an act of the legislature should be resolved in favor of upholding the act has peculiar force in the solution of the question of whether or not the act has been in form constitution-

ally passed, because such a constitutional question has to do with legislative procedure. In other words, it has to do with the methods of transacting public business by a co-ordained branch of the state government, and not with those constitutional guaranties of personal rights which it is the peculiar province of the courts to protect.

In *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, the court observed:

"An act of the legislature will not be declared void except in cases where the violation of this constitutional inhibition is most clear, and sound policy and legislative convenience require that this provision should be liberally construed."

The title of the act there involved is "An act to grant and prescribe power to counties relative to public works . . .," and notwithstanding the title made no mention of the power of eminent domain, it was held sufficient to authorize the granting of such power in the body of the act.

In *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91, an act entitled "An act providing for the location, construction and maintenance of the University of Washington . . ." was held sufficient to authorize in the body of the act the sale of the old university site in the city of Seattle, notwithstanding the title of the act did not in terms mention that subject.

In *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214, an act entitled "An act to establish a general uniform system of public schools" was held sufficient to authorize a provision in the act prescribing vaccination of children as a prerequisite of their right to attend the public schools, though the subject of vaccination was not in terms mentioned in the title.

In *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771, it was held that an act entitled "An act relating to trade marks" authorized provisions in the act prescribing penalties for its violation, though no mention was made of that specific subject in the title.

In *State ex rel. Great Northern R. Co. v. Superior Court*, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793, the title of an act reading "An act to provide for the formation of corporations" was held sufficient to authorize the conferring upon corporations of the power of eminent domain.

Among numerous other decisions showing the liberal tendency of the court and its deference to legislative discretion upon this subject, the following may be noted: *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *State v. Moran*, 46 Wash. 596, 90 Pac. 1044; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914; *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938.

Counsel for respondent suggests some doubt as to the subject of local assessments being a proper subject of legislation within the title of this act, since the words "local improvements" only, are used therein as descriptive of the subject-matter of the act. We do not understand this thought to be advanced as a serious argument against the propriety of including the subject of local assessments in the body of the act. This, however, as a preliminary suggestion, is worthy of notice. We think whatever contention might be made to that effect would find its answer in the fact that the term "local improvements" suggests to the common understanding "local assessments" to pay the cost of such improvements. When a street improvement is constructed by a city and the whole cost thereof paid by the city from its general funds, such improvement does not differ in its legal aspects from any other public improvement. Indeed, the only thing that substantially differentiates a local improvement from any other public improvement is the manner of exercising the taxing power to pay for its construction. In other words, it is a local improvement when it is of that nature which entitles the city to cause it to be paid for by local assessments against property which is benefited by its

construction, and when the city elects to so treat it. It seems quite plain to us that the term "local improvements," as used in the title of this act, is inclusive of the subject of local assessments.

It is contended in respondent's behalf that the restrictions upon the rights of lien holders of certificates of delinquency for general taxes, prescribed by § 40 of the local improvement law above quoted, is not germane to the subject of local assessments and the liens therefor. The argument seems to go even farther than this, and proceeds to a considerable extent upon the theory that the subjects of general taxation and local assessments are so separable as to preclude legislation thereon in the same act without violating § 19 of art. 2 of the constitution, above quoted, requiring that no bill shall embrace more than one subject. We are unable to assent to these views. It seems to us that in this local improvement law, dealing, as it rightfully does, as far as its title is concerned, with the subject of local assessments and the liens thereof, the legislature had ample power to prescribe the rank of local assessment liens as compared with general tax liens in the hands of private persons, as well as other liens. The extent to which taxes, whether general or special, shall become liens upon property and the relative rank of such liens is purely a question of legislative will. 28 Cyc. 1198; 37 Cyc. 1138.

To say that, in a local improvement and assessment law, which by its title purports to cover only that subject, there cannot be constitutionally prescribed the rank of local assessment liens as compared with general tax liens in the hands of private parties, would also be in effect to say that, in a general tax law which by its title purports to cover only that subject, there cannot be constitutionally prescribed the rank of general tax liens as compared with local assessment liens. This seems necessarily so, in view of the fact that legislative power touching the extent and rank of both this class of liens is equal. It could as well be said that a me-

chanics' lien act which by its title referred only to that subject could not in the body of the act make that lien superior to mortgage liens for want of sufficient title to the act, or because of duplicity of subject-matter.

Counsel for respondent seem to rely principally upon the decision of this court in *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68, and observations therein made touching the distinction between general taxes and local assessments. What was there said was by way of argument for the purpose of showing that, as the law then stood, local assessment liens were inferior in rank to general tax liens, under the provision of the then general tax law reading as follows:

"The said lien [general tax lien] shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real estate may become charged or liable."

It was held that the concluding language of this quoted provision included local assessments, rendering them inferior to the lien of general taxes. We find nothing in that decision touching the question of the power of the legislature to prescribe the relative rank of the two liens in the one act. Indeed, so far as the title of the act is concerned, reading: "An act to provide for the assessment and collection of taxes in the state of Washington," the power of the legislature was there recognized to be sufficient to prescribe in the body of the act the relative rank of the liens, though the title of the act was silent on the subject of local assessments. If this can be done, we are quite unable to see why the same thing could not be done in an act relating alone to local improvements and local assessments, as was done in this act, since, as we have seen, the power of the legislature is equal as to both classes of taxation. We are of the opinion that the provision of the local improvement act here in question is not unconstitutional because of any violation of the constitutional requirement that "no bill shall embrace more than

one subject, and that shall be expressed in the title." Const., art. 2, § 19.

It is further contended by counsel for appellant that § 40 of the local improvement act of 1911, above quoted, is unconstitutional in that it constitutes an attempt to revise or amend a section of the general revenue law of the state without setting forth the section so attempted to be revised or amended, as required by § 37 of art. 2 of the constitution above quoted. The portion of the general revenue law which it is claimed was attempted to be so unconstitutionally amended is Rem. & Bal. Code, § 9262 (P. C. 501 § 253), then in force, which permitted a private holder of a general tax certificate of delinquency to foreclose the same upon his paying accrued general taxes only, and together with other sections of the general revenue law in effect, rendered such foreclosure a bar to local assessment liens as well as all other liens. *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68; *Pennsylvania Co. v. Tacoma*, 36 Wash. 656, 79 Pac. 306; *Ballard v. Ross*, 38 Wash. 209, 80 Pac. 439. As we have already pointed out, this local improvement act is complete within itself and purports to deal with the entire subject of local improvements, including local assessments and the liens thereof. Counsel for respondent rely particularly upon our former decisions in *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, and *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791. It may be conceded that counsel's contention finds some support in these decisions, but we think they are no longer controlling upon this question in the light of the more recent decisions of this court.

In *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 109 Pac. 316, Chief Justice Rudkin, speaking for the court, reviewed the question at length, citing and quoting from numerous authorities. The act there involved was entitled "An act relating to materialmen's liens and the enforcement thereof." The body of the act contained but one section and

dealt with but one phase of the mechanics' and materialmen's lien statute; that is, a certain notice to be given the owner by a lien claimant as a prerequisite to his right to enforce the lien, leaving the general lien statute otherwise untouched and making no reference thereto. Plainly this act worked an amendment to the general lien law, but it did not purport to be such upon its face, being an act complete within itself. The problem was much like that presented in the *Copland* case. The act was held not to violate any provision of the constitution by reason of the manner in which it worked a change in the general lien statute. After reviewing a number of authorities, the following observations are made at page 82:

"It seems to us the foregoing authorities demonstrate that the act in question is not violative of the constitutional provision under consideration. Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication, and as said by the court in *Ex parte Pollard, supra* [40 Ala. 77], 'Whether an amendatory or an original act should be employed is a matter of legislative judgment and discretion which the courts cannot control.' The purpose of the constitutional provision was to protect the members of the legislature and the public against fraud and deception; not to trammel or hamper the legislature in the enactment of laws. If the act in question were entitled an act to amend the lien laws of the state, by proper reference, its validity could not be called in question, yet, what additional information would such a title or such an act bring home to either the legislature or the public. True, such an amendment would direct attention to the existing laws on the subject, but such was not the object or purpose of the framers of the constitution. So long as a legislative act is complete in itself, and has a sufficient title, it satisfies the requirements of the constitution, whether it contains much or little. The legislature may embody all legislation relating to a given subject in a single act, or it may cover the subject by a succession of acts. This is entirely a matter of legislative discretion over which we can assume no control."

Following these observations is a criticism of the decision in the *Copland* case which materially weakens its force, and which may well be argued as in effect overruling it. It is worthy of note that Justice Fullerton concurred in these views, notwithstanding he was the writer of the opinion in the *Copland* case. These views are again adhered to and this decision quoted from with approval in *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802, and also in *State ex rel. Jones v. Clausen*, 78 Wash. 103, 138 Pac. 653. It is also worthy of note that Justice Chadwick is the writer of this decision, though he was also the writer of the decision in the *Arnold* case, relied upon by counsel for respondent.

We conclude that § 40 of the local improvement law of 1911 is a valid portion of that law, with which respondent must comply in the foreclosure of his general tax certificate of delinquency, and that the constitutional requirement as to amendments of existing laws was not violated in its enactment in this form.

The judgment is reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

MORRIS, C. J., took no part.

[No. 12967. Department One. June 7, 1916.]

J. K. PARKER *et al.*, *Appellants*, v. E. A. BRAINARD *et al.*, *Respondents*.[1]

FRAUD—MISREPRESENTATIONS—DUTY TO INVESTIGATE — EVIDENCE—SUFFICIENCY. Recovery for fraud in a trade in misrepresenting an orchard tract is not warranted where it appears that, upon request for a report, the tenant's wife made out answers to inquiries submitted, the defendant disclaimed knowledge thereof, and merely submitted the report for what it was worth; especially where each party to the trade undertook to make his own investigation and the exchange was made after the time for the investigation had elapsed and each had expressed himself as ready to make the exchange; the property being at hand where it might have been investigated.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 16, 1915, upon findings in favor of the defendants, in an action for damages for fraud, tried to the court. Affirmed.

S. H. Kelleran, for appellants.

O. E. Sauter and *William L. Waters*, for respondents.

FULLERTON, J.—This is an action for damages for alleged fraudulent representations upon an exchange of lands, brought by one of the parties against the other. The real estate broker who effected the trade was also made a party defendant on the ground of fraudulent representations on his part.

The plaintiff J. K. Parker had placed in the hands of J. C. Oliphant, a real estate broker, a fifty-acre ranch in Kitsap county for purposes of sale, and defendant E. A. Brainard had likewise placed with the same dealer a ten-acre ranch in Benton county for a like purpose. Both of the parties were residents of Seattle, Washington. After the properties had been on Oliphant's lists for some months, he conceived the idea of getting the parties to exchange

[1]Reported in 157 Pac. 1078.

their holdings, and to that end brought them together at his office some time in March, 1914. On the 28th of that month, a preliminary agreement was entered into between Parker and Brainard for the exchange of the properties, Parker adding to the Kitsap ranch five acres located in Pierce county, subject to a $75 mortgage, and also $125 cash. The agreement contained the following clause:

"It being understood that five days from date will be allowed for each to investigate and see the property offered, and, if found satisfactory to both that the deal will be closed in the office of Oliphant & Co. not later than April 2d."

It appears from the evidence that neither of the parties went to view the lands involved. On the fifth day of the period allowed for investigation, Parker called up Oliphant and told him that he was ready to close the deal. Oliphant notified Brainard, and the parties accordingly met at Oliphant's office on that day, April 2d. At this time Brainard objected to the Pierce county land as not satisfactory, and a modified agreement was made, substituting in place of the Pierce county land and $125 cash, $200 cash and a mortgage for $600 to be given back to Brainard on the Benton county ranch. The following day was fixed for closing the deal, at which date the exchange was finally effected. It was the understanding that Oliphant represented both sides in the deal, and each agreed to pay him a commission of $100. There were no values placed upon the respective properties by the parties; Parker merely agreeing to exchange his fifty-acre ranch, incumbered with a $1,800 mortgage, and pay virtually $800 cash additional, for Brainard's contract for the Benton county ranch, on which there was $800 due. In other words, plaintiff assumed a $1,600 indebtedness as against $1,800 assumed by Brainard.

The evidence tended to show that the Kitsap property was worth no more than the amount of the mortgage upon it, and that the Benton county property was not worth more than $1,250 or $1,500, less the sum due on contract.

Brainard had never seen his own property, and had no actual knowledge of its condition, and so told Parker. Oliphant had seen the ranch about a year before, and he told Parker that, at that time, the fruit trees were all in healthy condition. He also supplied Parker with a list of questions which he had submitted to a tenant on the property, with the answers returned. We set them out in full, as they form the basis for the fraud asserted by plaintiff.

"We want information as follows for a prospective buyer, as to the present condition of place, and will thank you for filling out the same as outlined, giving your views and knowledge of the ranch. Orchard, are trees in good condition? Yes in good condition, these grew about 3 ft this year. About what was raised on the place this season? About 25 boxes of peaches on eight trees; some apricots and cherries. I don't know as these was gathered before I come. Were the potatoes of good quality, and about what did they average, as would consist per acre? Good quality and about 200 bushel to the A. Were the grapes bearing this season? Yes. Are the vines in good condition? Yes. What would they average as to tonage? 3 Ton to A. In your opinion, what do you think of the place? Pretty good. All it needs is attention for 1 year. It would raise anything. It has good strawberry ground on it. About what sum would be necessary to put place in a fair condition? About $200 would put in good condition to seed and fix up the ten A. Where should money be applied to best advantage? I should have 10 loads of manure, or sow to vetch one fall and turn under, then sow to alfalfa."

To this was appended a schedule enumerating the fruit trees and berry bushes, as follows: 6 plum, 21 peach, 5 apricot, 261 apple, 12 cherry, 6 crab apple, 6 pear, 598 grape vines, 6 quince, 25 raspberry, 25 blackberry, 12 currant, 12 gooseberry.

This report on the place was understood to have been given by the man in charge, but was in fact made out by his wife without his knowledge, and differed materially from his evidence as given in behalf of plaintiffs. It was explained, how-

ever, that the tenant was frequently away from home, and that it had been the custom between them for his wife to open and answer his letters. This statement from the tenant was placed in Parker's hands and doubtless was largely influential in inducing him to make the trade. But it was given to him for what it was worth, was not vouched for by either Brainard or Oliphant, and seems to have been an honest effort on the part of Oliphant to get a reliable report on the condition of the property. Oliphant told him that, when he was on the place the year before that, there were five or six acres in fruit trees, which were just beginning to leaf out, and that the place was then in fairly good condition. This is supported by the testimony of another witness, Chapman, to the effect that the orchard was in good condition in June, 1913. The evidence discloses that a year later than Oliphant's visit the ranch was not up to the standard represented by the statement of the tenant shown to Parker.

We agree with the trial court that there was here no such evidence of fraud as will justify a recovery. The representations of the tenant were neither the representations of Brainard nor the representations of Oliphant, nor were they given Brainard for the purpose of inducing him to, or with the expectation that he would, rely upon them. It was a part of the agreement that an investigation should be made by the parties, and five days' time, which was deemed sufficient, was allowed for that purpose. This, to our minds, does not present a case of reliance upon representations. Each party undertook to make his own investigation, and the exchange was made after the time fixed for the investigation had elapsed and after each had announced his readiness to make the exchange. Nor does it present a case of property at a distance not expected to be examined, where reliance may be justly placed upon representations as to its condition and character. On the contrary, the situation of the parties brings the question within the principles announced in *Pigott*

v. Graham, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176, and *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L. R. A. 1915 B. 1069.

In the first case cited, we said:

"It must not be forgotten that the contracting parties were dealing at arm's length. No fiduciary relations existed between them—nothing to inspire confidence or disarm suspicion—and there was no imbecility of age, weakness or disease. The property in question was at hand, and an inspection of it by the defendants could have been made had they insisted upon it. The representations related solely to quantity, quality and value, the truth, or falsity of which could have been determined by an inspection. Under such circumstances, we think it will not do to hold that a party may successfully complain of his own failure to exercise ordinary care, prudence, and caution, when, by the exercise thereof, the injury of which he complains could not have arisen." *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

In the second case cited, it is said:

"It has always been the law that where the parties deal as strangers and the means of knowledge are equally available and the lands subject to the inspection of the purchaser, and he avails himself of the opportunity of inspection afforded him, he cannot be heard to say that he has been deceived, even though the truth has been withheld from him or the facts misrepresented, as the true facts are as available to him and as much within his knowledge as that of the one with whom he deals."

The evidence discloses that there was no fiduciary relation existing between the parties, and that they were intelligent business men, dealing with one another at arm's length. It does not show that there was any serious discrepancy in the values of the property exchanged. In fact the trial court found:

"That the reasonable market value of the consideration given by plaintiffs to defendants Brainard in the said exchange was less than the reasonable market value of the property received by the plaintiffs from defendants Brainard."

The view we have taken of the case in respect to the lack of fraudulent representations on which appellants may found an action for damages renders it unnecessary for us to consider their objection to the theory of damages applied by the trial court and the admission of evidence supporting such theory.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 12970. Department Two. June 7, 1916.]

LOIE KING *et al.*, *Respondents*, v. JOHN P. RAMSEY, SENIOR, *et al.*, *Appellants*.[1]

MASTER AND SERVANT — INJURIES TO SERVANT — ASSUMPTION OF RISKS—INCOMPETENT FELLOW SERVANTS—FRACTIOUS HORSE. One injured while working as a hay forker in stacking hay assumes the risk of the incompetence of a boy driving the horse on the hay fork and the fractious nature of the horse, where, after working one day, he complained about the boy then employed, resulting in the employment of the boy in question, who proved satisfactory to him, and he thereupon continued working with the boy and horse without complaint of either for a period of six days.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 11, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed.

John I. Melville, *Merritt, Oswald & Merritt*, and *Merritt, Lantry & Merritt*, for appellants.

Samuel P. Weaver and *Robertson & Miller*, for respondents.

MAIN, J.—This action was brought for the purpose of recovering damages for the death of Arthur King, who was the husband of the plaintiff Loie King and the father of Frances

[1]Reported in 157 Pac. 1077.

and Frederick King. The trial resulted in a verdict for the plaintiffs in the sum of $3,000. From the judgment entered upon the verdict, the defendants appeal.

The facts are these: During the year 1913, the appellants were the owners of two farms in Lincoln county which were three or four miles apart. They resided upon one farm, and Arthur King, for whose death this action was instituted, together with his family, lived upon the other.

King, during the haying season for the year mentioned, was in the employ of the appellants, and at the time of the injury which subsequently resulted in his death, was working with the haying crew in the capacity known as forker. His duties were, when the hay was brought in from the field upon what is known as a sled or float and dumped at the end of the stack, to set the hay fork in order that the hay might be lifted upon the stack. The stacking of the hay was being done by means of a derrick. The hay fork was attached to one end of a rope. To the other end a horse was hitched, and the rope passed over a pulley which was elevated over the stack by means of a derrick.

On or about July 25, 1913, after the stacking operations had been conducted for six or seven days, a load of hay came in, and before driving to the place where it was to be dumped, stopped in order that King might fork up the loose hay that had accumulated at the end of the stack. After this was done, he gave the signal for the driver of the load to drive in. When this signal was given, the horse at the other end of the rope started, pulling the fork from the place where it had been put, about sixteen feet from the stack, towards King, and the prong thereof penetrated his leg below the knee. The man on the stack, seeing the situation, called "whoa," and the horse, which was being driven by one Ralph Lynch, a boy in his fourteenth year, was stopped after it had gone a few steps. The stack at this time was about eight feet high and thirty or forty feet long. It was the sixth or

seventh stack that had been erected since the haying operations began at that place.

After the accident, King was taken into the house where he resided upon the place, and while his wound was being dressed by those present, stated that the accident was due to the negligence of the boy who was driving the horse. About ten days after the accident, King died.

The evidences relied on by the respondents for recovery are the statements of King at the time his wound was being dressed and statements claimed to have been made by the appellant John P. Ramsey, Senior, some time thereafter, to King's wife and one Clarence Reynolds, her brother. In these conversations Mrs. King and Reynolds testified that Ramsey admitted that the boy was careless and reckless, and that the horse was young and fractious, and that that was what caused the accident. Ramsey, at the time the accident occurred, was not present. The only persons present at the time of the accident were King, the driver of the load of hay, the man upon the stack, and the boy driving the horse.

The facts, as testified by the witnesses who were present at the time of the accident, show that the horse started in the ordinary manner and that the boy was in no sense negligent. During the days preceding the accident, when the stacking operations were being carried on, it was customary, when a fork of hay was to be lifted upon the stack, to give the signal, "all right." Whereupon the boy would start the horse. During the days that the horse had been working, it had learned this signal and some times would start when the signal was given. When the accident occurred, the signal given by King was intended to direct the driver of the load of hay to drive into the place where it was to be dumped, but the horse, being familiar with the signal, started when it was given. All the direct evidence upon the question is that the horse was seven years old, gentle, and had previously been used upon this kind of work.

The respondents claim that the declarations of Ramsey relative to the boy and the horse, and the statements of King at the time his wound was being dressed, raise a question of fact which it was the jury's province to determine. It will be assumed, but not decided, that the testimony as to the admissions of Ramsey, which were positively denied by him upon the witness stand, and the statements of King at the time the wound was being dressed, are not overcome, as a matter of law, by the direct testimony of the witnesses who were present at the time of the accident, and whose testimony shows that the boy was not negligent and that the horse started in the usual manner. It will likewise be assumed that the statements of King were a part of the *res gestae*, and were statements of fact and not conclusions; assuming that an issue was thus presented which it was for the jury to determine, whether the accident was due to the negligence of the boy or the nature of the horse, the question arises whether King had assumed the risk? Even if the horse was young and fractious, as claimed by the respondents, there is no evidence that the disposition of the horse was in any sense the cause of the accident.

When the stacking operations began about seven days previous to the accident, a boy by the name of Robacher drove the horse. He worked for one day, or a part of a day, and King complained to Ramsey that the boy was "no good." Ramsey thereupon discharged the boy and employed Lynch. This boy worked continuously thereafter until the day of the accident, a period of approximately six days. King, during all this time, was working as a forker. When the Lynch boy was hired, Ramsey said to King that if the boy did not prove satisfactory to him (King) he would let him go. The second day the Lynch boy was working, Ramsey inquired of King whether the boy was satisfactory, and received the reply: "This boy is all right, you can leave the boy."

Ramsey, as above stated, resided upon his other farm, and was only at the place where the stacking operations were

being conducted for a short time each day. The two places were connected by telephone. No complaint was made by King to Ramsey, or to any one else, that the Lynch boy was not satisfactory. Under these facts, it seems obvious that King assumed the risk incidental to the work in which he was engaged. Had he complained, as requested by Ramsey, if the boy were unsatisfactory, and the boy had been retained notwithstanding such complaint, a different question would be presented.

The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

[No. 12802. Department One. June 9, 1916.]

FIRST THOUGHT GOLD MINES, LIMITED, *Appellant*, v. STEVENS COUNTY, *Respondent*.[1]

TAXATION—ASSESSMENT—MINING LANDS—OVERVALUATION—REDUCTION. An assessment of 141.7 acres of mineral land for various years at $80,000 to $40,000 will be reduced as grossly inequitable and palpably excessive and hence constructively fraudulent, where it appears that the vein or lode of paying ore has either been completely exhausted or so hopelessly lost as to make the property not an operating mine but a mere prospect, with no paying ore in sight, while the assessment was based upon a value as an operating mine and its past performances, and that its fair value as a prospect did not exceed from $50,000 the first year to $10,000 for subsequent years.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered October 2, 1914, in favor of the defendant, in an action for equitable relief, tried to the court. Reversed.

Jesseph & Bourland and *F. Leo Grinstead*, for appellant.

Howard W. Stull and *Stull, Wentz & Bailey*, for respondent.

[1]Reported in 157 Pac. 1080.

ELLIS, J.—Action to cancel and set aside the assessed valuations placed upon plaintiff's gold and silver mining properties for the years 1909, 1910, 1911 and 1912, to require defendant county to accept an equitable amount as taxes for those years, and to cancel all tax liens and certificates against the property.

Plaintiff is the owner of 141.7 acres of mineral land, in Stevens county, having purchased the same in 1899 for between $25,000 and $30,000. From that time until 1906, it developed the property by digging tunnels, etc., and in the latter year began shipping ore to the smelters. The ore assayed an average of $15 or $16 a ton, and until the year ending June 1, 1910, yielded a profit. It was at all times uncertain, however, and no great amount of paying ore was ever known at any one time. After July, 1910, there were no further receipts from any smelters, and each year since then the operation of the mine and its maintenance has caused a deficit. It is clear that, at the present time, there is no paying ore in sight, and whether more will be discovered is purely speculative. The board of equalization, on the hearing on the application for a reduction in the assessed valuation, were advised of this condition and no one appeared before the board to testify that the land had any real value as mineral land. At the time of trial, about 6,700 tons of ore were piled up on the dump. This ran on an average between $3 and $4 a ton, which would not justify sending it to the smelter.

It is shown by the record that contiguous land of the same general nature as plaintiff's was assessed at a valuation of $4 to $10 an acre. Plaintiff's 141.7 acres was assessed as follows:

For the year 1909	$80,200
1910	$80,000
1911	$80,000
1912	$40,000

The reduction of fifty per cent in the valuation placed upon the property in 1912 was made after the board of equalization had for the first time visited the property. The court made no findings, and entered judgment placing the following valuations on the property:

For the year 1909	$80,200
1910	$60,000
1911	$40,000
1912	$40,000

Costs were awarded to neither party. Plaintiff appeals.

Appellant contends that the evidence not only warrants, but makes imperative, a much greater reduction than that made by the court, and that the property should be assessed the same as neighboring properties of the same general character, plus the value of the improvements. It is the established law in this state that courts will grant relief from a grossly inequitable and palpably excessive over-valuation of real property for taxation as constructively fraudulent, even though the assessing officers may have proceeded in good faith, and this without regard to the action of the board of equalization. *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *Benn v. Chehalis County*, 11 Wash. 134, 39 Pac. 365; *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480; *Miller v. Pierce County*, 28 Wash. 110, 68 Pac. 358; *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617; *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855; *Case v. San Juan County*, 59 Wash. 222, 109 Pac. 809; *Metropolitan Bldg. Co. v. King County*, 62 Wash. 409, 113 Pac. 1114, Ann. Cas. 1912 C. 943; *Northern Pac. R. Co. v. Pierce County*, 77 Wash. 315, 137 Pac. 433. Each case of this character must of necessity rest upon its own facts.

On the facts before us, we are satisfied that the assessments, even as reduced by the trial court, are still so excessive as to invoke the rule of the foregoing decisions. The evidence is overwhelming that the vein or lode of paying ore

has either been completely exhausted or is so hopelessly lost as to make the property not an operating mine but a mere prospect, and from the many unsuccessful efforts which have been made to find a further vein or lode bearing paying ore it would seem to be a somewhat discredited prospect. The uncontradicted evidence shows that, under present conditions, the ore would have to carry a value of from $12 to $13 a ton in order to bring a profit justifying operation of the mine; that at no time has there ever been a sufficient body of ore in sight to justify the erection of any kind of mill for the treatment of ore; that it costs approximately $4 to $4.75 a ton to mine the ore, and the cost of the shipping and treatment averages $6.24 per ton; that there is now practically no ore on the property, so far as many searches and assays show, which would yield over $4 or $5 a ton. During the fiscal year from June 1, 1908, to May 31, 1909, there was a net profit of less than $45,000. From June 1, 1909, to May 31, 1910, the mine yielded a profit of a little over $50,000. From June 1, 1910, to May 31, 1911, there was a loss of over $11,000. Since then there have been apparently no operations except drifting in search of paying veins or lodes, without success.

While we cannot agree with the appellant that this property is worth no more than neighboring property as farm land, we are satisfied that it cannot be justly valued as an operating mine, but only as a prospect. A reading of the record makes it too clear for argument that the assessing officers were influenced more by the past performance of this property as an operating mine than by its present worth as a prospect, which its performances down to date alone would justify. It is true we have no definite evidence as to what the value of this property is even considered as a mere prospect. The record, however, shows that, in the years 1903, 1904 and 1905, when the property was plainly nothing but a prospect, it was assessed at $10,000, and the taxes were paid, so far as the record shows, without complaint.

In the year 1909, as we have seen, the mine was a producing property. Its output in that year shows, however, that it was not worth $80,000. We think that a fair valuation for that year would be $50,000, and for the years 1910, 1911 and 1912, $10,000 each. To these valuations should be added the value of the improvements, which the evidence shows to be approximately $1,500.

The judgment is reversed, and the cause is remanded with direction to enter judgment in accordance herewith.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 12834. Department One. June 9, 1916.]

WILLIAM J. CREMIDAS, *Respondent*, v. GUST DALLAS, *Appellant*.[1]

PLEADING — VARIANCE — NONSUIT — AMENDMENTS TO CONFORM TO PROOF. In an action tried to the court without a jury, it is not error to refuse to grant a nonsuit on the ground of variance, where the evidence was admitted without objection, as the complaint will be deemed amended to conform to the proof.

TROVER AND CONVERSION—REMEDIES—IMPLIED CONTRACT. Upon the conversion of a note, the owner may waive the tort and recover its value, as upon an implied contract to pay the same.

SAME—EVIDENCE—VALUE OF NOTE—PRESUMPTIONS. In an action upon an implied contract to pay the value of a note converted by the defendant, the presumption, in the absence of proof to the contrary, is that it was of the value shown upon its face; and such presumption is not overcome by proof that the note was overdue and in the hands of a bank for collection.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be disturbed on appeal where the witnesses were about equally divided and the trial court had the advantage of viewing them.

Appeal from a judgment of the superior court for King county, Humphries, J., entered December 5, 1914, upon find-

[1]Reported in 157 Pac. 1084.

ings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

C. Liliopoulos, for appellant.

Ryan & Desmond, for respondent.

FULLERTON, J.—In December, 1913, the respondent, Cremidas, the appellant, Dallas, and one George Stavros formed a copartnership and opened a restaurant in the city of Seattle. The initial cost of opening the restaurant was $1,500. Of this sum Dallas contributed $1,000 and Stavros $500, Cremidas contributing nothing. Cremidas was a professional cook and an experienced restaurant man, and during the time he remained in the restaurant had the management of the same, devoting his entire time thereto. Dallas did not give any of his time to the restaurant, although he put his brother to work therein without wages other than his board and such small sum as he required for personal expenses. Stavros devoted his time to the business for some two months, when he sold his interests to one James Vappas. Vappas took the place of Stavros in the partnership and the business was continued in the same manner as before until some time in July, 1914, when Vappas purchased the interest of the other partners. The purchase price was $675. Of this sum $100 was paid in cash, and notes were taken for the balance, $575, payable at later dates. The cash payment was divided equally between Cremidas and Dallas. The latter, however, took the notes in his own name and has since continued to hold them, claiming them as his own.

This action was instituted by Cremidas against Dallas to recover one-half of the face value of the notes. In his complaint, however, Cremidas alleged that the restaurant was sold for $650, and demanded judgment for $275. Dallas answered, setting forth the transaction which gave rise to the notes.

At the trial it developed that the partnership agreement between the parties was oral. Cremidas testified—and his

testimony is corroborated by certain of his countrymen who claimed to have heard the agreement—that it was agreed between them that he was to advance nothing towards the expense of opening the restaurant, but that this expense was to be borne by the other partners, and that he was to have a third interest in the business and property in consideration of his experience, and in consideration of his agreeing to devote his entire time to the business. Dallas testified—and in this he was corroborated by Stavros—that, after the agreement to open the restaurant had been entered into, Cremidas made it known that he was unable to put up his share of the initial cost, and that he thereupon agreed to make the advancement for Cremidas and carry it until such time as it could be repaid "out of the profit of the business, if there should be any profit, and otherwise, in the course of the business."

The evidence further developed that the restaurant had made no profits. No evidence was given as to the value of the notes further than that they were overdue, that they were in a bank for collection, and that only $100 had been paid thereon by Vappas. The trial court found the facts in favor of Cremidas' version of the contract and entered a judgment in his favor for $287.50, being one-half the face value of the notes. Dallas appeals.

At the close of the evidence, the defendant moved for a judgment in his favor on the ground that there was a variance between the allegations of the complaint and the facts in evidence. But the record as brought to this court does not show that the defendant objected on this ground when the evidence was offered, and we held, as early as the case of *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780, that, in an action tried before the court sitting with a jury, it was error to grant a nonsuit on this ground in the absence of such an objection, and that the court should have treated the complaint as amended to correspond with the evidence. The rule has been affirmed in many subsequent cases, and

especially in cases such as the one at bar, where the trial is by the court sitting without a jury and the case is triable *de novo* in this court.

The second contention is that the court erred in entering judgment for the face value of the notes. This conclusion is founded, if we have correctly gathered the reason, on the ground that the complaint is based on an implied promise to pay the one-half value of the notes, while the evidence shows a liability, if it shows a liability at all, as for a conversion of the notes; the contention being that an action in assumpsit will not lie to recover the value of property which has been wrongfully converted while the property remains in the possession of the wrongdoer. Since, however, the complaint must be deemed amended to correspond with the proofs, it would seem to follow that such a recovery could be had as the proofs warrant, whether that recovery be based on the theory of an implied contract to pay their value, or upon the theory of a wrongful conversion. But be this as it will, the rule in this state is not as the appellant contends. The authorities from other jurisdictions are divided on the question, and this court, in *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599, followed the line of cases holding that, when one wrongfully converts the property of another, the injured party may waive the tort and recover the value of the property as upon an implied contract to pay its value. It follows, therefore, that, should we treat the action as one upon an implied contract to recover the value of property wrongfully retained but not disposed of by the defendant, there was no error on the part of the trial court in determining the action upon its merits.

Another objection against a recovery is the contention that there is no proof of the value of the notes. But their face value was shown, and the presumption is, in the absence of proof to the contrary, that the value of a note is what the maker agrees to pay. *Potter v. Merchants' Bank*, 28 N. Y.

641, 86 Am. Dec. 273; *Loomis v. Mowry*, 8 Hun 311; *Anderson v. First Nat. Bank*, 6 N. D. 497, 72 N. W. 916.

In an action for the conversion of the note the wrongdoer may, of course, prove the insolvency of the maker and thus lessen the amount of the recovery, but in the absence of such proofs, the *prima facie* case made by showing their face value becomes conclusive, entitling the plaintiff to recover the face value. The only evidence here which is thought to overcome the presumption is that the notes were overdue, were in the bank for collection, and were unpaid, save as to the sum of one hundred dollars. But these facts do not overcome the presumption, as they have no bearing on the solvency of the maker.

Finally, it is urged that the evidence does not justify the findings of the court on which a recovery was permitted. As we have shown, there was a sharp conflict in the evidence as to the interest the respondent had in the property of the restaurant. If his version is to be accepted, his right to one-half of the price for which the restaurant was sold follows as a matter of course. If the appellant's version be the true one, it is equally plain that no recovery ought to be allowed. Neither version presents the improbable, and the witnesses to the facts were about equally divided in number. In such a case, a view of the witnesses when testifying is all important, and since the trial court had this advantage, which we do not have, we do not feel inclined to disturb the findings.

The judgment is affirmed.

MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12911. Department One. June 9, 1916.]

EDWARD M. SOBODA *et al.*, *Appellants*, v. NOLF & COMPANY *et al.*, *Respondents*.[1]

APPEAL—RECORD—ABSTRACT OF EVIDENCE—DISMISSAL. Except in an extreme case an appeal will not be dismissed for undue amplification of the abstract, under 3 Rem. & Bal. Code, § 1730-1, providing for an abstract of the evidence in narrative form unless it is "necessary for the discussion of the evidence."

APPEAL—REVIEW—PLEADINGS—AMENDMENT. An appeal will not be dismissed on account of the insufficiency of the complaint to state a cause of action where the evidence is sufficient, since the complaint will be deemed amended to conform to the proof.

TRIAL—FINDINGS—NECESSITY. Findings of fact and conclusions of law are not essential in an equity case tried *de novo* on appeal.

BROKERS—POWERS — SCOPE OF AUTHORITY — WAIVER — RIGHTS OF PRINCIPAL. It is beyond the scope of the authority of a real estate broker, employed to effect an exchange of properties, to enter into an agreement waiving the right to rely upon representations made by the other party as an inducement to the trade, and the principal is not estopped by the agent's signing such an agreement without notice to him.

EXCHANGE OF PROPERTIES—FRAUD — EVIDENCE — SUFFICIENCY. A mortgage for $4,250, included as part consideration for an exchange of properties, and represented by defendant to be bankable and as good as cash, is shown to have been in bad faith, where it appears that the mortgaged property, standing in the name of defendant's wife, was worth from $1,600 to $2,000, with a loan value of $600, was listed by defendant for sale at $3,200 and the notes and mortgage given to defendant the following day, and indorsed without recourse, and was not recorded until four months later, about two weeks before the trade, and an alleged grantee of the land never recorded his deed or paid any interest.

SAME—FRAUD—MISREPRESENTATIONS—RELIANCE UPON. On an exchange of properties, a party living in Iowa, whose agent lived in Oregon, may rely on representations, made to induce the trade, that a real estate mortgage on property in this state, fair on its face, was in good faith, and readily convertible into cash; the same being statements of fact known to be untrue.

[1]Reported in 157 Pac. 1100.

SAME—RESCISSION—PARTIAL — DIVISIBLE CONTRACT. Where consideration for an exchange of properties was divided into distinct items, and included a note and real estate mortgage for $4,250, the consideration is divisible, and partial rescission may be granted where such item was not according to representations inducing the trade.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 27, 1915, dismissing an action for rescission, tried to the court. Reversed.

Van Dyke & Thomas, for appellants.

S. D. Wingate and *W. B. Bebb*, for respondents.

PER CURIAM.—This is an action for rescission as to one of the items of consideration entering into an exchange of properties. The action is based on the ground that plaintiff had been induced by fraud and deceit to accept in part consideration of the exchange a worthless note and mortgage of the face value of $4,250. From a judgment for defendants, the plaintiffs prosecute an appeal.

The defendants have interposed a motion to dismiss the appeal, based on the ground that the abstract of the record fails to conform to statutory requirements and to the rules of the supreme court. The abstract is undoubtedly rather ample and largely sets out the evidence by question and answer. But the statute itself (Laws 1913, ch. 116, p. 349; 3 Rem. & Bal. Code, § 1730-1 *et seq.*) in providing that the testimony shall be in narrative form without questions and answers, makes an exception in a case where it is "necessary for the discussion of evidence." Attorneys will differ as to the amount of condensation required in an abstract, and we do not feel justified, other than in an extreme case, in penalizing one who errs on the side of mere fullness by dismissing his appeal.

The defendants also move to dismiss the appeal on the ground that the complaint does not state facts sufficient to constitute a cause of action, for the reason that it does not

state a cause of action for partial rescission, or any relief whatsoever. But assuming, without deciding, that to be a fact, we think the evidence fully discloses such a right of action, and the complaint will be deemed amended on appeal to conform to the evidence.

Among the errors assigned by plaintiffs, is the court's failure to make findings of fact and conclusions of law. But this being an equitable action, triable *de novo*, no such findings are essential. *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

In January, 1913, Edward M. Soboda, of Cedar Rapids, Iowa, who was the owner of eighty-six acres of orchard land situated near Medford, Oregon, wrote J. C. Brown, a real estate broker at that place, directing him to sell or exchange the property, informing him in the letter that no deal would be considered unless $5,000 cash could be realized on the exchange, as he was badly in need of that much money for straightening up his private affairs. Upon receiving the letter, Brown submitted it to John A. Torney, also of Medford, who at once interested Frederick Nolf & Company, of Seattle, Washington, in an effort to consummate a trade. Nolf & Company were informed that $5,000 cash was an essential factor in any deal involving the property. While anxious to make an exchange of some of their holdings for plaintiff's orchard, defendants seem to have had some disinclination to raise, or difficulty in raising, the cash payment required. On the other hand, by a series of artful letters, Nolf began to dangle the note and mortgage in question before the eyes of the Medford brokers, who respectively represented him and plaintiffs. On February 5, 1913, he wrote his agent Torney as follows:

"I have the following belonging to myself personally. The thought has come to me perhaps I could trade it for the bearing orchard and get half of the return this fall. One mortgage, six per cent, $3,000; runs 1, 2, 3 years; one mortgage $4,250, seven per cent runs three years, total $7,250.

Do not confuse these mortgages with any other deals as they belong to my wife personally, and, if I do business with them, it must be gilt edge."

On February 18, 1913, Torney received another letter urging him to do some hard work to put through defendants' offer for the orchard, adding: "Of course I must admit that at this moment I haven't the cash, but can no doubt secure the same. You will have to 'log' pretty hard to have them take the property we offer, but the game is worth the powder." On March 10, 1913, Nolf again wrote Torney, saying: "Please forget about mortgages. Can dispose of them here. These belong to my wife, and she wants securities here. Sorry to bother you about it." On March 12, 1913, another letter was written, in which it was said: "Have received no word from you for several days. . . . Would like to get this Soboda deal out of the way before we begin on the others." On March 18, 1913, Nolf & Company again wrote Torney as follows: "We cannot lose the Soboda deal. . . . Can we make this deal with Soboda, $3,000 down, $2,000 six months? . . . We wish to close up on the Soboda property." On March 19, 20 and 21, other letters were written urging the consummation of the "Soboda deal," the letter of the last date closing with the admonition: "Do not let Soboda withdraw as we must make this deal." Finally, Nolf & Company again wrote Torney on April 2, 1913, as follows:

"We submitted a proposition to you to take the place of the $5,000, namely, the two real estate contracts, cash, and two lots in Woodward, Oklahoma. If the above will not close up the matter, as a last resort try this: One mortgage on Seattle real estate, 72x30 2½ for $4,250, three years, seven per cent. One real estate contract, about $650 due, payments being now made at the bank. Small balance cash. This mortgage belongs to my wife, but will be included in the trade. Try and work on the above first proposition first."

Torney had assured Brown, the agent of plaintiffs, that he was acquainted with Nolf and his business associate, Rev. Forbes, assistant pastor of the First Presbyterian church in Seattle, stating that they were men of high character and financially responsible, and that he could accept Nolf's representations without any fear of being deceived. Relying thereon, Brown at once recommended the acceptance by his principal of the $4,250 proposition, writing him as follows:

"The parties who wish to buy your property are Frederick Nolf & Co. of Seattle. Nolf's partner is Dr. Forbes, assistant pastor of the First Presbyterian church of Seattle. They are responsible people of good standing, financially and otherwise.

"This is the way I see it, the $4,250 first mortgage drawing seven per cent interest you can use in your business through your local bank, so as to make it worth that much cash to you. This is first class paper, and we had hard work to get Nolf to use it in the deal. The $650 real estate mortgage is nearly as good as cash, since the payments are constantly coming in. This with the $100 makes up a total of $5,000 quick assets, practically that much cash down."

Soboda, on receipt of this letter, wired Brown he would accept the trade as outlined. The Soboda property was valued at $60,000. The items exchanged therefor were the following:

320 acres Gilliam County, Ore.	$16,000	
Less mortgage	1,000	
		$15,000
University lot to balance mortgage		1,000
Two Chelan Orchard Tracts ($1,500 each)		3,000
Five acres in Kitsap county		1,000
1st Mortgage (Seattle property)	4,250	
Real estate contract	650	
Cash	100	
		5,000
Contract for $5,000 per year		35,000
		$60,000

On receiving information that Soboda's agent was satisfied with the proposition for exchange, Nolf went to Medford with a written preliminary contract drawn up, which Brown signed as agent for Soboda, after demurring to the following clause:

"It is expressly understood by both parties hereto that no representations whatever concerning any of the property herein described are made by either party as inducement to the other to enter into this agreement; but that each relies wholly on his own independent inquiry as to facts affecting the property bargained for by them and it respectively."

Nolf now claims that Soboda is estopped by the above clause from claiming that he was misled as to the character of the $4,250 item of consideration represented by the Jablonski notes and mortgage. But Soboda never had any knowledge of the signing of the agreement containing the waiver, and it was clearly not within the scope of the agent's authority to so bind his principal, since he merely represented him as a broker in the exchange of properties. Moreover, on the agent's objection at the time to the incorporation of such a stipulation, Nolf asserted the clause did not apply to the mortgage and notes, but only to the properties for which abstracts were to be furnished; that the preliminary contract was merely a "gentleman's agreement" to protect him until the execution of the final contract. Before signing the preliminary agreement, Brown asked in reference to the $4,250 notes: "Mr. Nolf, are these notes readily convertible into cash?" and Nolf replied, "Sure, they are as good as wheat."

The evidence shows that the land covered by the Jablonski mortgage was worth from $1,600 to $2,000, with a loan value of $600. The assessed valuation for taxation was $620. The whole transaction regarding the $4,250 mortgage is somewhat peculiar. It bears all the earmarks of bad faith. During the whole time the record title to the property has been in the name of Nolf's wife. On October 1, 1912, Nolf listed it for sale at $3,200, about forty per cent more than the evidence shows it to be worth, and on the following day

took notes and mortgage to himself personally from one Jablonski for a purported loan of $4,250 on the property. It is true Jablonski claims a deed was given him, but he never had it recorded, and "dealt it off," as he says, within from six to nine months. If he did convey it, his grantee never had the deed recorded. With respect to the mortgage itself, it was not recorded until four months after its execution, and not until Nolf began to suggest it for trade on the Soboda deal. There was also indorsed on the notes by Nolf a statement that possession of the lots was not delivered to the mortgagor until January 18, 1913, and that the mortgagor was released from payment of interest until that date; a time some three and one-half months subsequent to their execution and about two weeks prior to the closing of the deal. This was done wholly at the instigation of Nolf; Jablonski himself testifying that he never asked for any extension, had no reason to do so, and never paid any interest on the notes. The notes were indorsed by Nolf "without recourse."

Plaintiffs resided in the state of Iowa and their agent for the exchange resided in Oregon, each too far away to make an investigation. They were fully justified, therefore, in relying upon the representations of defendant as to the value of the mortgage, which was a matter peculiarly within his knowledge. The instruments, being fair upon their face, would naturally preclude suspicion that they were not what they purported to be. Nor were the representations mere matters of opinion, but they were made as statements of fact and known by the maker to be untrue. *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Gillette v. Anderson*, 85 Wash. 81, 147 Pac. 634; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Jacoby v. Hollada*, 78 Wash. 88, 138 Pac. 558; *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149.

The defendants contend that the contract is not a divisible one, and hence is not susceptible of partial rescission. But in this we think defendants err. The consideration for the transfer of plaintiffs' property was divided into distinct

items of varying character, some of which might fail as consideration and the others stand good. The $4,250 item of notes and mortgage being other than it was represented to be, we think the plaintiffs are entitled to tender it back and recover a judgment against the defendants for the amount thereof as part of a divisible consideration.

In Wharton on Contracts, § 748, it is said:

"When a consideration is divisible, and the price can be apportioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion can be recovered back."

In *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, where the sale was of a stock of merchandise and land, it is said:

"When the things are of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance, or by one contract."

See, also, 2 Parsons, Contracts (9th ed.), p. 673; *Higham v. Harris*, 108 Ind. 246, 8 N. E. 255; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Miner v. Bradley*, 22 Pick. 457; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611. In the latter case, it is held that the discount as one transaction of three promissory notes is a divisible contract.

This case being one triable *de novo*, we have carefully examined all the evidence and have reached the conclusion that the trial court erred in entering judgment in favor of the defendants. The judgment is reversed, and the cause remanded with instructions to permit a return of the note and mortgage and to enter judgment in favor of plaintiffs and against the defendants for the sum of $4,250, with interest at six per cent per annum from the date of the exchange of the properties.

[No. 13152. Department One. June 9, 1916.]

THE STATE OF WASHINGTON, *Plaintiff*, v. THE SUPERIOR COURT FOR JEFFERSON COUNTY, *John M. Ralston, Judge, Respondent*.[1]

EMINENT DOMAIN—PROPERTY SUBJECT—STATE LANDS—TIDE LANDS—DEVOTION TO PUBLIC USE—WATER WAYS—STATUTES. Rem. & Bal. Code, § 8740, authorizing railroad corporations to condemn land and any interest in land including lands granted to the state and also tide and shore lands belonging to the state, refers to state lands held in a proprietary capacity only, and does not include state lands segregated from the public domain and appropriated to a public use by due dedication as a water way by virtue of Id., §§ 8092-8099, relating to harbor areas and water ways across the same.

SAME. The fact that such dedicated water way had never been improved or used by the public, after a lapse of twenty-five years, does not affect its segregation from the general mass of the state's land or render it subject to condemnation; as such delay does not operate against the state.

SAME—CONDEMNATION—PARTIES—OBJECTION BY STATE. Upon a railroad's condemnation of city streets, the city can convey no rights as against the state by defaulting, and the state has sufficient interest to appear and contest the appropriation as against petitioners without right.

Certiorari to review a judgment of the superior court for Jefferson county, Ralston, J., entered October 5, 1915, adjudging a public use and necessity in condemnation proceedings. Reversed.

The Attorney General and *R. E. Campbell, Assistant*, for relator.

Corwin S. Shank and *H. C. Belt*, for respondent.

FULLERTON, J.—This is a proceeding brought by the Port Townsend and Puget Sound Railway Company against the city of Port Townsend and the state of Washington to condemn for terminal purposes certain real property lying part-

[1]Reported in 157 Pac. 1097.

ly within and partly without the corporate limits of the city named. The lands sought to be condemned are tide lands. On December 3, 1891, the state of Washington, acting by and through its then board of harbor line commissioners, established a harbor area in front of the city of Port Townsend, and from this harbor area, extending inland and northerly across the intervening tide lands, it platted, dedicated and reserved a strip of land 180 feet wide as a public way for water craft; the same being called on the dedicating plat Hill Avenue Water Way. On the tide lands lying between the harbor area and the uplands and extending easterly from the water way mentioned, there was also subsequently platted and dedicated to public use three certain streets, called on the plat Front street, Water street, and Washington street. Neither the water way nor the streets mentioned have ever been vacated by any direct action on the part of the state or city, nor has the state, in so far as the record discloses, parted with its title to the tide lands adjoining the water way or lying between the streets mentioned. The tract sought to be condemned includes not only the tide lands adjoining the water way and streets named, but a part of the water way and parts of the streets, and an appropriation of the parts sought to be condemned by the railway company will render them useless for the purposes for which they were dedicated. The petition in condemnation was served upon both the city of Port Townsend and the state. The city defaulted. The state however appeared through its Attorney General and questioned the right of the petitioner to condemn not only the water way, but the streets as well. A judgment of condemnation was granted by the court below, and this judgment the state seeks to review in this proceeding.

The water way in question was established and dedicated pursuant to the act of the legislature of March 28, 1890. Laws 1889-90, p. 731; Rem. & Bal. Code, §§ 8092-8099 (P.

C. 477 §§ 217-231). The provisions of the act pertinent to the present inquiry are the following:

"§ 8092. There shall be established one or more public ways across all of the tide flats that are situated within or in front of any incorporated city or town, or within two miles either way from any incorporated city or town, within the state of Washington.

"§ 8093. The public ways provided for in the last preceding section shall not be less than fifty nor more than one thousand feet wide, and shall commence at the outer or deep water end, in not less than twenty feet of water at low tide, and shall extend inland across the state's tide lands.

"§ 8094. The public ways above provided for shall be so located as to include, as near as is practicable, within their bounds all navigable streams running through the tide flats in which they are located, and at such other places as may be necessary for the present or future convenience of commerce.

"§ 8095. A correct plat of all public ways so established shall be made, one copy of which shall be filed with the secretary of state, one copy with the commissioner of public lands of the state; one copy shall be kept in the office of the chairman of the board of harbor line commissioners, and each county shall be furnished with a correct plat of all such public ways established within its borders, and such plats shall be filed as city or town plats are filed and become a part of the county records.

"§ 8096. All the public ways that may be established under the provisions of this chapter are, and shall forever be, reserved from sale or lease as public ways for water crafts."

At the legislative session of 1893, provision was made for the excavation of water ways and the filling in of the adjoining tide lands. However, no excavation was ever done on the water way in question and it remained, up to the time of the commencement of the condemnation proceedings, in the condition it was when originally platted and dedicated. The streets mentioned were extended across the tide lands by the city of Port Townsend in virtue of § 3, art. 15 of the constitution, which authorizes municipal corporations to extend

their streets over intervening tide lands to and across the harbor areas authorized therein to be reserved, and in virtue of the statutes passed pursuant thereto.

The petitioner asserts its right to condemn the tide lands, the part of the water way, and the parts of the streets in question under the statutes of eminent domain which were enacted subsequent to the enactment of the water way statutes before cited. The particular section relied upon is found in Rem. & Bal. Code at § 8740 (P. C. 405 § 85), the material parts of which read as follows:

"Every corporation organized for the construction of any railway, . . . is hereby authorized and empowered to appropriate, by condemnation, land and any interest in land or contract right relating thereto, including any leasehold interest therein and any rights of way for tunnels beneath the surface of the land, and any elevated rights of way above the surface thereof, including lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state (but not including harbor areas), which may be necessary for the line of such road, railway or canal, or site of such bridge, not exceeding two hundred feet in width, besides a sufficient quantity thereof for toll-houses, workshops, materials for construction, excavations and embankments and a right of way over adjacent lands or property, to enable such corporation to construct and prepare its road, railway, canal or bridge, and to make proper drains; . . . and in case of a railway to appropriate a sufficient quantity of any such land, including lands granted to the state for university, school and other purposes and also tide and shore lands belonging to the state (but not including harbor areas), in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct, and for yards, terminal, transfer and switching grounds, docks and warehouses required for receiving, delivering, storage and handling of freight, and such land, or any interest therein, as may be necessary for the security and safety of the public in the construction, maintenance and operation of its railways; . . . And provided further, that if such corporation locate the bed of such railway or canal upon

any part of the track now occupied by any established state or county road, said corporation shall be responsible to the county commissioners of said county or counties in which such state or county road so appropriated is located, for all expenses incurred by such county or counties in relocating and opening the part of such road so appropriated. The term land as herein used includes tide and shore lands but not harbor areas; it also includes any interest in land or contract right relating thereto, including any leasehold interest therein."

The petitioner derives the power to condemn the water way and the streets in question from the particular words of the statute authorizing corporations for the construction of railways to appropriate by condemnation "land and any interest in land or contract right relating thereto, . . . including lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state (but not including harbor areas) which may be necessary for side tracks, depot, transfer and switching grounds," and other like purposes. It does not contend, if we have correctly gathered the position of its learned counsel, that the statute has application to a water way or street which has been improved and is in actual use by the public, but does have application to all such water ways and streets which are not fitted by nature for such actual use, and there is no immediate intention on the part of the proprietor to artificially fit them for that purpose.

If, however, we have mistaken counsel's meaning and it be that they mean to assert that the statute is broad enough to permit the condemnation for railway purposes of any property of the state, other than the specifically exempted part, we cannot agree with the contention. As is well known, the state holds title to property in two entirely distinct capacities, the one a proprietary capacity, as individuals generally hold property, and the other a governmental capacity, that is, in trust for the public use. The rule, therefore, is that a statute conferring upon the state or other municipal corporation

the general authority to sell, or a statute conferring the right to condemn state or other municipal property generally, will, in the absence of express words to the contrary, be confined to such property as it holds in its proprietary character. This principle we announced in the case of *Samish Boom Co. v. Callvert*, 27 Wash. 611, 68 Pac. 367, in the following language:

"The rule is that, whenever a tract of public land is once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public land, so that authority to sell in general terms will not be construed to embrace or operate upon it, although no reservation is made of it."

So, also, in *State v. Whitney*, 66 Wash. 473, 120 Pac. 116, where we quoted with approval from the case of *Wilcox v. Jackson*, 13 Pet. 498, the following:

"We go further, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace, or operate upon it; although no reservation were made of it."

Indeed, if this be not the rule, the legislature has, by the act in question, granted to railway companies power to condemn any of the state lands for railway purposes (save that of course which is specially exempted), which would include the lands on which its capitol buildings are situated.

Unless the distinction we have suggested counsel intended to make be sound, there can be no question that the water way and the streets in question are among the exempted classes. The first was set apart for a public use in virtue of a statute duly enacted for that purpose, and the other in virtue of the constitution itself. The lands within their boundaries thus become segregated from the general mass of the state's lands which it holds in its proprietary capacity, and become vested in that special class which it holds specially for the public use.

Nor can we think the suggested distinction tenable. It is true that the water way was established and the streets were extended over these lands more than a quarter of a century ago, and it is true that up to this time no effort has been made to fit them for the uses for which they were intended. But it is also true that the state has not passed any law, or taken any affirmative step, looking to a change in the capacity in which it holds title to them. On the contrary, in so far as actions of this sort is concerned, it holds them today in the same capacity it held them the moment they were segregated from the general mass of its property. If, therefore, the capacity in which the state holds them has been changed from a governmental to a proprietary capacity, the result has been accomplished by lapse of time and the omission of the public to fit them for the purposes for which they were intended. But we cannot think this alone sufficient. The state has the right to proceed in its own time and in its own way to improve its property, and its delay in so doing can convey no legal right in the property to others which such others would not have possessed had the delay not have occurred. We have even held with reference to streets that possession, improvement, and the payment of taxes, no matter how long continued, did not prevent the municipality from ejecting the possessor therefrom and resuming possession itself. *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549. Manifestly, the state does not hold its property with any less sanctity.

As supporting the right of the petitioner to condemn the lands, we are cited to our cases which hold that property held by one public service corporation is, under certain circumstances, subject to condemnation by another public service corporation; the case specially relied upon being that of *State ex rel. Washington Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 144 Pac. 719. But we cannot think the principle involved in these cases is the principle involved

here. In them there was no question of the power to condemn the particular property of which condemnation was sought, but the question was one of superior right as between the corporations themselves. This is made clear by the following quotation from the case cited:

"It is not the mere ownership of property by a public service corporation that protects it from acquisition by another public service corporation seeking to acquire it for a public use by right of eminent domain; but the question of such a right of acquisition must find its answer in the present or prospective use of such property by the condemnee, the prospective use thereof by the condemner, the comparative advantages flowing to the public as between the ownership thereof by the condemnee and condemner, and the comparative advantage and disadvantages flowing to the condemnee and condemner by the ownership of such property."

In the case before us, the question is solely one of power. The question is whether the state has granted to railway companies the right to condemn land which it has reserved and set apart for a public use. There is no question of superior right as between two public service corporations.

The petitioner makes the further objection that the state is without interest sufficient to enable it to object to a condemnation of the streets named, even though it may contest the petitioner's right to the water way. But streets are public highways, established for the use of the public, and the state in its sovereign capacity may object to their appropriation, as against any one who attempts to appropriate them without right. The city of Port Townsend, by its default, conveyed no right of property in the streets. A city has no power under the statutes to grant affirmatively to a railway company the right to the use of its streets to the exclusion of the public therefrom (*State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576); and what it cannot do by affirmative grant, it cannot do by defaulting in a condemnation proceeding.

In its brief the petitioner refers to this water as a "paper water way," and to these streets as "paper streets," asserting that they exist only in name. Presumably it is meant by this that they have never been improved so as to make them of use to the public. But if it be meant thereby to assert that they have no potentiality in fact, we cannot agree with the assertion. As we have said, they were laid out and established pursuant to law, and have never been vacated by any act of the authorities creating them. They have thus all of the validity of any water way, or of any street, whether used or unused; and while the proper authorities, in a proper proceeding, may allow them to be taken for uses other than that for which they have been set apart, they cannot be so taken by an ordinary proceeding in condemnation.

Our conclusion is that the trial court erred in adjudging them subject to condemnation. The judgment is therefore reversed, and the cause remanded with instructions to exclude them from the condemnation order.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13219. Department Two. June 9, 1916.]

J. W. COLLINS, *Respondent*, v. TERMINAL TRANSFER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES. Where an auto truck was in a defective condition, requiring advancement of the spark in starting and rendering it dangerous to crank, the owner, charged with notice of the defect, is negligent and liable for injuries sustained in cranking by a driver's helper, who was ordered by the driver to take and operate the truck without giving him notice of the defect.

SAME—ASSUMPTION OF RISK—NOTICE OF DEFECT. A driver's helper does not assume the risk of a defect in an auto truck rendering it dangerous to crank, of which he had no notice, as the risk was not open and apparent.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A driver's helper is not guilty of contributory negligence as a matter of law in attempting to start an auto truck, which stopped on a trip that he had been ordered to take, when he had no notice of a defect making it dangerous to crank it, and he had often seen the driver start it by cranking.

SAME—FELLOW SERVANTS—SUPERIORS—SEPARATE PARTS OF WORK. The driver of an auto truck and his helper are not fellow servants as to a trip which the driver had ordered the helper to take, when the helper was injured through a defect in the truck of which he was not notified by the driver.

SAME—WORKMEN'S COMPENSATION ACT—EXTRA HAZARDOUS EMPLOYMENTS. Employment as helper to the driver of an auto truck is not classed as extra hazardous by, and is not within, the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*; which act is therefore not a defense to an action by the servant against the master for personal injuries sustained in the course of his employment.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered July 3, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in cranking the engine of a motor truck. Affirmed.

[1]Reported in 157 Pac. 1092.

H. M. Ramey, Jr., for appellant.

Ballinger & Hutson, for respondent.

MAIN, J.—This action was brought for the recovery of damages for personal injuries, alleged in the complaint to be due to the defendant's negligence. In its answer, the defendant denies negligence on its part, and pleads four affirmative defenses: (a) contributory negligence; (b) assumption of risk; (c) negligence, if any, of a fellow servant; and (d) that the plaintiff was engaged, at the time of his injury, in a work which brought him within the workingmen's compensation act. The affirmative defenses were denied by the reply. The cause was tried to the court and a jury, and resulted in a verdict for the plaintiff in the sum of $800. Motion for judgment notwithstanding the verdict having been made and overruled, judgment was entered upon the verdict. From this judgment, the appeal is prosecuted.

The facts, which are either not disputed, or which from the evidence the jury had a right to find, are briefly as follows: One R. M. McDaniels was employed by the defendant as a driver of one of its automobile trucks. The respondent was employed as a helper. On September 12, 1914, while the respondent was attempting to crank the engine of the automobile truck, it kicked back and broke his arm. Prior to this time, the respondent had worked as a helper to McDaniels upon the truck for approximately two months. During this time, while riding with McDaniels upon the seat, the respondent had learned to drive the car upon a smooth road, and to start and stop the same. He had frequently seen McDaniels crank the engine, but he had never himself attempted to crank it prior to the time he was injured. The respondent had no knowledge of how to adjust the spark prior to cranking the engine. He did not know that, if the spark was advanced, the engine was likely to kick back.

On the morning that the accident happened, McDaniels directed the respondent to take the truck and go to a garage

for the purpose of getting certain equipment which was necessary for handling an order of freight which had been received. The respondent took the automobile and drove to the garage, got the equipment for which he had been sent, and in backing the automobile out of the garage the engine stopped. He thereupon attempted to crank it, and received the injury. When the truck was turned over to him by McDaniels, the spark was advanced. Owing to a defect in the magneto it was necessary to operate the truck with the spark advanced in order to get sufficient power; and it was also necessary in starting the car, owing to this defect, to keep the spark advanced. To crank the engine with the spark advanced was dangerous, for it was likely to kick back. The car had been in this defective condition for some time previous to the accident, and the appellant, in the manner in which it had provided for such notice, had been notified of this fact by McDaniels. The respondent had no knowledge of the defect in the machine. The respondent, as helper, was required to take orders from McDaniels. As helper he was not permitted in the office of the company; and notice of this fact was posted therein.

The assignments of error all go to the question as to whether the evidence was sufficient to take the case to the jury. There is no claim of error, either as to the instructions given or refused. From the facts stated, it appears that the engine of the truck was in a defective condition, which made the cranking thereof dangerous. The appellant was chargeable with notice of this fact. It is a familiar rule of law that it is the duty of the master to use reasonable care to furnish a servant with reasonably safe instrumentalities with which he is to do his work. *Norman v. Alaska Coast Co.*, 81 Wash. 64, 142 Pac. 434. Under this rule, the respondent is entitled to prevail, unless it can be said, as a matter of law, that one or more of the appellant's affirmative defenses defeat recovery.

As to the defense of assumption of risk, the respondent did not know the defective condition of the engine, and by the exercise of reasonable care could not have ascertained its condition. Neither was the defect open, apparent, or obvious. This defense cannot be sustained.

The defendant was not guilty of contributory negligence, as a matter of law, in attempting to crank the automobile under the attendant circumstances. It was for the jury to say whether he acted as a reasonably prudent man would under like or similar circumstances. He was directed by McDaniels, from whom he was required to take orders, to take the truck and go to the garage for the purpose of getting the equipment. While upon this trip the engine stopped. He had frequently seen McDaniels crank the engine, and having no knowledge of the defect therein, it was reasonable for him to attempt to start it again without returning and summoning McDaniels for that purpose.

Whether the respondent and McDaniels were fellow servants when they were working together in loading and unloading the truck we need not here inquire. The fellow servant doctrine is not applicable to this case. Fellow workmen may be fellow servants with regard to some particular part of an employment, and not as to other parts. *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313. The respondent's injury was due to a defective appliance furnished by the master. In using this instrumentality, he was acting in obedience to orders from McDaniels, which it was his duty to obey.

The respondent was not engaged in an employment which brought him within the provisions of the workingmen's compensation act. 3 Rem. & Bal. Code, ch. 7, § 6604-1 *et seq.* The employment in which he was engaged is not classified in that act as extra-hazardous. Neither has it been so classified by the industrial insurance commission. Upon this question the case is controlled by *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608.

Since it cannot be held, as a matter of law, that any of the appellant's affirmative defenses are sufficient to defeat recovery, it follows that the judgment must be affirmed, and it is so ordered.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and CHADWICK, JJ., concur.

[No. 13288. Department Two. June 9, 1916.]

G. A. DICKIE *et al.*, *Appellants*, v. THE CITY OF CENTRALIA, *Respondent*.[1]

MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—TIME FOR FILING. A claim for damages against the city alleging injuries on Dec. 14, 1913, received by reason of typhoid germs in the city water, which injuries "are still accruing and have been continuously accruing since the date aforesaid," filed on April 4th following, is too late, not having been filed within thirty days after the time when the claim accrued, as required by Rem. & Bal. Code, § 7998; filing within the thirty days not being excused by the allegations of continuously receiving additional injuries.

SAME—CLAIMS FOR DAMAGES—NATURE OF CLAIMS. Although the city's negligence occurred in business rather than in a governmental function, a claim for damages through typhoid germs in the city water must be filed within thirty days, under Rem. & Bal. Code, § 7998, requiring all claims for damages to be so filed.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered November 23, 1914, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

Albers & Allen, for appellants.

W. N. Beal and *Wm. R. Lee*, for respondent.

BAUSMAN, J.—This case comes to us upon demurrer sustained to an amended complaint, which alleged that Centralia had let its water system become polluted by typhoid germs,

[1]Reported in 157 Pac. 1084.

with the result that the plaintiff wife imbibed that disease. What expressly determined the demurrer was plaintiff's failure to file a claim with the city in the thirty days required by Rem. & Bal. Code, § 7998 (P. C. 77 § 57). That section expressly forbids the payment of any claims not seasonably presented, that is, "within thirty days after the time when such claim for damages accrued . . . All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury and state the time when the same occurred."

The allegations of the complaint, as particularized by reference to a claim which plaintiffs did file, were:

"That on the 14th day of December, 1913 . . . Sarah A. Dickie . . . received an injury and is continuously receiving injuries by reason of being poisoned by typhoid germs through the water furnished the said Sarah A. Dickie by the city of Centralia through its water system. That the said injuries are still accruing and have been continuously accruing since the date aforesaid, . . ."

This claim was not filed until April 4, 1914.

Plaintiffs thus fixed the date of the injury and time began to run against them. They are not relieved by the additional allegations of continuously receiving additional injuries. No statute has ever excused the filing of the claim and the filing of it within the thirty days. The statute of 1915 (Laws 1915, p. 421), merely allows the incapacitated to comply with the time provision through others. It did not see fit to modify or repeal it, but only to afford such persons opportunity in that way. This was after we had frequently had occasion to pronounce the filing of the claim a condition precedent absolute in all conditions of the injured to protect municipalities against belated or pretended claims. *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73. Thus it is to no purpose to allege here, as was done, that Mrs. Dickie was all the while incapacitated. Others must file the claim for her. This her husband did, but did much too late

and not within the saving clause of the 1915 statute as to prior filings through third persons, since these had to be "within the time." Plaintiffs accordingly cannot enjoy the ruling made on rehearing in *Haynes v. Seattle*, 87 Wash. 375, 151 Pac. 789. Nor do plaintiffs state when they got knowledge of her having the disease or knowledge of its source. The demurrer was properly sustained. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365. It is for the legislature to say how far it can safely relax this regulation.

Plaintiffs argue, however, that these authorities do not apply in the present instance because the city's negligence occurred in a function neither political nor governmental, but of a business description. But this statute is general as to all claims for "damages." We see no reason for any distinction between the damages it may incur from the two sorts of activity and, at all events, it is not for this court to make one. It has been rejected in a recent case in another jurisdiction. *Frasch v. City of New Ulm*, 130 Minn. 41, 153 N. W. 121.

Judgment affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13296. Department Two. June 9, 1916.]

IN RE PERCIVAL APPLICATION NO. 92, TO LEASE HARBOR AREA, THE CITY OF OLYMPIA, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—EXTENSION OVER TIDE LANDS. A city abandons and loses its right to extend a street over tide lands to the harbor lines, as authorized by Const., art. 15, § 3, where it acquiesced in a state lease to, and occupancy by, one maintaining a public dock and wharf for nearly twenty years, and for ten years after passing ordinances extending its streets, did not attempt to physically occupy or improve the portion of the street leased by the state, or take any steps to call the state's attention to its claim to the street; in view of §§ 1 and 2 of the same article, authorizing the state to make a lease of such lands.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered November 16, 1915, affirming an order of the board of state land commissioners respecting a lease of harbor area. Affirmed.

George R. Bigelow, for appellant.

Thos. M. Vance, for respondent Percival.

The Attorney General and *R. E. Campbell, Assistant*, for respondent Board of State Land Commissioners.

Dan F. North and *George D. Montfort, amici curiae.*

PARKER, J.—The city of Olympia has appealed to this court from a judgment of the superior court for Thurston county affirming an order and determination of the board of state land commissioners to lease to J. C. Percival a portion of the harbor area belonging to the state lying in front of the city. Counsel for the city contend that the leasing of a portion of the harbor area, as determined upon by the board of state land commissioners, interferes with its right to extend and maintain certain of its streets over the portion of the harbor area in question, which right it claims under article 15 of the state constitution reading as follows:

[1]Reported in 157 Pac. 1082.

"Section 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

"Sec. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

"Sec. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

The facts determinative of the claimed rights of the city are not in dispute and may be summarized as follows: The portion of the harbor area which the board of state land commissioners have determined to lease to Percival is so situated, if the lease be made, as to prevent the extension of certain of the streets of the city over it. The city's objection to the proposed lease is in so far as it would interfere with the city's claimed right to extend its streets over the harbor area. At all times since the admission of the state and the adoption of the constitution in the year 1889, Percival has occupied the portion of the harbor area in question, maintained a wharf and carried on a general wharfage business thereon. In December, 1891, the state board of

harbor line commissioners caused the harbor in front of Olympia to be surveyed, fixed the inner and outer harbor lines, and filed a plat thereof. This was done in pursuance of the provisions of article 15 of the constitution, above quoted, and the Laws of 1889-90, p. 239. In the adoption and filing of this plat the commissioners did not designate thereon any extension of the streets of the city over the portion here in question. Nor is there anything in the record before us indicating that the city then made any request of the commissioners to extend or recognize the extension of the streets here in question over the portion of the harbor area now proposed to be leased to Percival.

In the years 1893, 1894, 1895 and 1898, Percival filed applications with the board of state land commissioners to lease the portion of the harbor area here in question. These applications were either not acted upon or not disposed of upon the merits by the board of state land commissioners and are of no consequence in our present inquiry, except in connection with the continued occupancy by Percival of the portion of the harbor area now proposed to be leased to him. In June, 1899, Percival filed with the board of state land commissioners his application here involved, to lease the portion of the harbor area occupied by him. For reasons not clearly shown by the record before us, which reasons, however, are of no moment here, this application remained pending and undisposed of until December 31, 1914, when the order of the board here in question was made, under Laws of 1899, p. 225. By the terms of that order the past occupancy of Percival was recognized, for which he is to pay rental to the state the sum of $1,441.65. He is to pay rent at the rate of $150 per annum for the term of eleven years, commencing on the first day of October, 1914, and is awarded the right to continue in his occupancy substantially as in the past.

In the years 1893 and 1905, the city passed ordinances in terms purporting to extend certain of its streets over the

portion of the harbor area here involved. Nothing was done by the city, however, towards bringing to the board of state land commissioners notice of these ordinances or the claim of the city of its right to so extend its streets over the portion of the harbor area here in question until November 10, 1913, when the city caused its clerk to transmit to the board of state land commissioners certified copies of these ordinances. This was the first claim ever made by the city to the state authorities of its right to extend its streets over the portion of the harbor area occupied by Percival and now proposed to be leased to him. The city never attempted to physically occupy or improve as streets this portion of the harbor area, nor has it ever interfered with Percival's occupancy thereof.

Counsel for appellant city rests its claim entirely upon the provisions of section 3, article 15 of the constitution above quoted, proceeding apparently upon the theory that the city's constitutional right to extend its streets over the harbor area is a continuing right and that this provision of the constitution is self-executing. This must of necessity be the only theory upon which the city's claimed right rests, since no statute has ever been enacted by the legislature making any provision for, or method of procedure looking to, the extension by cities of the third class, to which class Olympia belongs, of their streets over harbor areas. It may be that there is a sense in which this constitutional provision is self-executing, and possibly the city might physically extend its streets over unoccupied and unleased harbor area and thereby acquire such portion of the harbor area for street purposes. We are not, however, here concerned with the acquisition of streets by the city in any such manner. Whatever right the city may have to so extend its streets over the harbor area, it is to be remembered that, by the provisions of article 15 of the constitution above quoted, the state also has the right and power to lease the harbor area, looking to the conveniences of navigation and commerce. As

said by Justice Ellis, referring to article 15 of the constitution, in *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 117 Pac. 232, "It can hardly be conceived that the framers of the constitution intended to grant to the state less power in this regard than they thus plainly gave to municipalities." So, in the present case, we have these two powers seemingly coming in conflict.

In *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 53 Pac. 547, there was incidentally involved the question of the right of the city of Seattle to extend certain of its streets over state tide lands, though the city was not a party to that action, which right, so far as section 3 of article 15 of the constitution is concerned, is the same as a city's right to extend its streets over harbor areas. Touching this right of cities to so extend their streets, Chief Justice Scott, speaking for the court, observed:

"If the right to so extend the streets continues for all time, it is at once apparent that the value of the tide lands to be sold and of the harbor area to be leased will be much impaired, if purchasers and lessees can be compelled at any time to vacate the same and lose valuable improvements without getting any recompense in case the city should see fit to lay out or extend streets over the same. . . . In making and correcting this plat it was doubtless understood to be for the best interests of the city not to extend all of its streets across the tide lands lying between Railroad avenue and the harbor area on account of the size of the blocks, and that it would better subserve the interests of commerce and the interests of its citizens and the public to extend only each alternate street beyond Railroad avenue. The city had the opportunity of extending Union street at that time, if it so desired, without cost, and not having seen fit to exercise the right, the state had power to dispose of that part of it which would have been within the street if extended."

Possibly the city of Seattle had abandoned its right to so extend its streets over tide lands by acts which may be considered somewhat more of an affirmative nature than the acts of the city of Olympia here involved. It seems to us, how-

ever, that, under all the circumstances here appearing, it must be held that the city of Olympia has lost its right to extend its streets over the portion of the harbor area involved. Percival's long occupancy, use and improvement of the portion of the harbor area in question, acquiesced in by the city, entitles him to receive the lease as determined, and upon the conditions prescribed by the board of state land commissioners.

We conclude that the judgment of the superior court affirming the order and determination of the board of state land commissioners should be affirmed. It is so ordered.

MORRIS, C. J., MAIN, BAUSMAN, and HOLCOMB, JJ., concur.

[No. 12962. Department One. June 13, 1916.]

O. G. OLSON, *Respondent*, v. PAUL SCHULZ, *Appellant*, THEODORE F. EGGERS *et al.*, *Defendants*.[1]

PRINCIPAL AND AGENT — RELATION — WRONGFUL ACTS OF AGENT — LIABILITY OF PRINCIPAL. A creditor, secured by note and mortgage, who, by power of attorney, appointed an agent to collect payments and execute *pro rata* releases upon the sale of the mortgaged lots, cannot recover from the mortgagor for misappropriations by the agent in failing to apply payments on the mortgage; since he was his agent, and not the agent of the debtor or mortgagor.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 5, 1915, upon findings in favor of the plaintiff, in an action on a promissory note. Reversed.

Govnor Teats, *Leo Teats*, and *Ralph Teats*, for appellant.

Boyle, Brockway & Boyle, for respondent.

FULLERTON, J.—This is an action brought by the respondent, Olson, against the appellant, Schulz, and the de-

[1]Reported in 158 Pac. 90.

fendant Eggers, to recover a balance claimed to be due upon a promissory note, and against the defendants Lund to recover for the same liability because of the wrongful act of R. H. Lund in releasing a mortgage given as security for the note. Judgment went against Schulz and the Lunds; Eggers being released because of his prior discharge in bankruptcy. Schulz appeals.

In November, 1907, Eggers was indebted to Olson in the sum of $3,161, and to Schulz in the sum of about $2,000. Eggers, at that time, owned a tract of land situated in or near the city of Tacoma. In the month named, the parties met in the office of Lund & Lund, who were attorneys at law, for the purpose of making some arrangement for the payment of the debts. At the meeting, it was mutually agreed between them that Eggers should deed the land to Schulz; that Schulz should join with Eggers in a note to Olson for the amount of Eggers' indebtedness to him, and secure the note by a mortgage upon the property; that the property should be platted into lots and placed on the market for sale, and when sold that the proceeds should be applied, first, to the payment of the amount due Olson, and next, to the payment of the amount due Schulz; Olson agreeing to release the lots as they were sold "upon payment of *pro rata* share total indebtedness" to him. On November 14, 1907, pursuant to the agreement, Eggers deeded the property to Schulz, Schulz and Eggers gave a note to Olson, and Schulz executed a mortgage to Olson to secure the same. Later the property was platted into lots and placed on the market for sale. On January 22, 1908, Olson, to facilitate the giving of releases, executed a power of attorney to R. H. Lund, authorizing and empowering Lund, as his true and lawful attorney in fact, to receive and receipt for all moneys due and payable upon the note executed to him by Schulz and Eggers, and to execute releases and satisfactions covering the property described in the mortgage or any part thereof.

Subsequently all of the lots, with the exception of two, were sold at prices ranging from $350 to $500, the total amount realized therefrom being about $8,000. The sales were made by a real estate agent and were closed through the offices of Lund & Lund, who collected the money received from the sales and procured the execution of the releases for the property sold. None of the money paid for the property was received by Schulz, nor did he have anything to do with the sales. His only part in the transaction was to execute deeds and contracts of sale to the property when he was called upon so to do from time to time, all of such instruments being signed and left by him at the offices of Lund & Lund.

Of the moneys received from the sales of the property, but $2,820 was paid on the note of Olson. What became of the balance, the record does not disclose. Some of it was paid to Eggers, but how much is not shown. Some was paid in costs and commissions, but neither is this amount shown. It is reasonably clear, however, that Lund received much more than enough to satisfy the note of Olson.

The last two lots mentioned were applied in satisfaction of a debt due from Eggers to the Scandinavian-American Bank of Tacoma. The transfers necessary to accomplish this purpose were made by Schulz in the usual manner at the office of the Lunds, but his testimony is to the effect that he did not know the purposes to which they were applied.

On this record we cannot conclude that there is any existing liability against Schulz. R. H. Lund was the agent of Olson, not the agent of Schulz, and as between Olson and Schulz, payments to Lund were payments to Olson. If, therefore, Lund misappropriated the funds, the loss must fall upon Olson, whose agent Lund was, not upon Schulz, who was in no wise a party to the misappropriation. This is true even though the misappropriation consisted of advancements to Eggers. No such advancements could be made without the consent of Olson, or without the consent of

the agent who was acting for him. In either event, the loss caused thereby is Olson's, in the absence of a showing that Schulz also consented, of which there is nothing in the record.

The judgment against Schulz is reversed, and the cause remanded with instructions to enter a judgment to the effect that the plaintiff take nothing by his action against him.

MORRIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 13038. Department One. June 13, 1916.]

A. BERTSCHINGER, *Respondent*, v. R. H. CAMPBELL, *Appellant*.[1]

WITNESSES—IMPEACHMENT—IMPEACHING OWN WITNESS — CROSS-EXAMINATION—SCOPE. Where cross-examination of a witness for defendant went beyond any legitimate bounds of cross-examination and elicited matters supporting plaintiff's case, not touched upon in direct examination, the plaintiff makes the witness his own as to such matters, and the witness may be impeached by the defendant, upon laying proper foundation, by showing contradictory statements made at other times and places.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 31, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for extortion. Reversed.

Albers & Allen and *Hayden, Langhorne & Metzger*, for appellant.

J. N. Hart, George W. Wilson, and *Wedmark & Grimm*, for respondent.

FULLERTON, J.—This is an action brought by the respondent to recover the sum of $1,000, alleged to have been extorted from him by the appellant under a threat of prosecution for an alleged criminal operation on a pregnant

[1]Reported in 158 Pac. 80.

woman. The appellant, in defense, denied the extortion, and alleged affirmatively that an uncompleted operation for an abortion had been performed upon the woman by the respondent, and that the money was paid him as a physician and surgeon for completing the operation and for caring for the woman until she recovered, the operation being necessary to save the woman's life.

The woman attended the trial under subpoena as a witness for the respondent, but was not placed on the witness stand by him. When the appellant put in his case, he called the woman and questioned her as to when and under what circumstances she first met the respondent. She answered, fixing the time and place as December 26, 1912, at the respondent's office in Portland, Oregon, and by stating that she was then accompanied by the man who was responsible for her condition. Answering further questions, she testified that she went to the home of the appellant at Vader, in this state, on December 28, 1912, to take service as a domestic, and that she visited no other doctor after leaving the office of plaintiff in Portland until she arrived at the home of the appellant. She was also shown a writing and was asked if the signature thereto was hers, answering in effect that she did not think it was. The respondent then took the witness and, under the guise of cross-examination, proceeded to develop his own case, eliciting from the witness testimony to the effect that the respondent had not operated upon her nor given her medicines for the purpose of producing an abortion, and that the abortion had been performed by the appellant through the administration of medicines and the use of instruments. The appellant, upon redirect examination, then asked her if she had not made contrary statements to certain persons which he named, to which she answered in the negative. He then called as a witness one of such persons and interrogated her concerning the statements. Objection was made thereto by the respondent, which the trial court sustained. The appellant's counsel then called the attention of

the court to the fact that he had laid a foundation for impeaching the witness by the questions propounded to her on his reexamination, and asked if the court's ruling would be the same if he called the other persons named. On being informed that it would, he took exceptions to the ruling.

The jury returned a verdict for the respondent for the full amount demanded. This appeal is from the judgment entered on the verdict, the appellant assigning as his sole error the refusal of the court to admit in evidence the impeaching testimony.

We think the court was in error in excluding the testimony. It is true the witness sought to be impeached had been placed upon the stand as a witness by the appellant, but the cross-examination went beyond any legitimate bounds of cross-examination, in that it elicited matters not touched upon in her direct examination, and which were directly essential to the establishment of the respondent's case. It is a well-settled rule that, when new affirmative or defensive matter, not touched upon in the direct examination, is brought out by the cross-examination, the cross-examining party makes the witness his own as to such matters, and that the witness may be impeached by showing that he has made, at other times and places, contradictory statements. *Hubner v. Metropolitan St. R. Co.*, 77 App. Div. 290, 79 N. Y. Supp. 153; *State ex rel. Hospes v. Branch*, 151 Mo. 622, 52 S. W. 390; *Bebee v. Tinker*, 2 Root (Conn.) 160; *Artz v. C., R. I. & P. R. R. Co.*, 44 Iowa 284; *Green v. Metropolitan St. R. Co.*, 42 App. Div. 160, 58 N. Y. Supp. 1039; *Smith v. Utesch*, 85 Iowa 381, 52 N. W. 343; 40 Cyc. 2693.

The rejection of the impeaching testimony constituted prejudicial error, for which the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13361. Department One. June 13, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. HENRY H. HOWARD, *Respondent*.[1]

PERJURY—FALSE SWEARING—STATUTES. A prosecution for perjury in the second degree may be predicated upon an affidavit as to the financial condition of a bank voluntarily made by one of its officers and not required by law; under Rem. & Bal. Code, § 2353, defining perjury in the second degree as false swearing concerning any matter whatsoever by any person "whether as a volunteer or in a proceeding or investigation authorized by law"; the use of the disjunctive plainly manifesting the intent to treat voluntary false swearing the same as false swearing in a proceeding or investigation.

SAME—"OATH"—STATUTES. An "oath" as a basis of a prosecution for false swearing or perjury in the second degree does not imply a form of inquiry required by law; especially in view of Rem. & Bal. Code, § 2354, defining an oath as "an affirmation and every other mode authorized by law of attesting the truth of that which is stated," and declaring that any person who shall state any matter under oath shall be deemed to swear thereto.

SAME—SWORN STATEMENTS—AFFIDAVITS BEFORE NOTARY. Under Rem. & Bal. Code, § 8298, authorizing a notary public to take affidavits and administer all oaths required by law to be administered, false swearing or perjury in the second degree may be predicated upon a false affidavit sworn to before a notary public, although the affidavit was not required by law; an affidavit being not only a written oath but a statement of things sworn to.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 14, 1915, upon sustaining a demurrer to the information, dismissing a prosecution for perjury in the second degree. Reversed.

Alfred H. Lundin, *W. F. Meier*, and *John D. Carmody*, for appellant.

Eugene A. Childe, *A. J. Falknor*, and *R. G. Sharpe*, for respondent.

[1]Reported in 158 Pac. 104.

Ellis, J.—Defendant was charged, in the superior court of King county, with the crime of perjury in the second degree. The information, in substance, stated that, on December 31, 1913, he subscribed and swore to the contents of an affidavit with intent that the same be published as true, before a notary public of the state of Washington, duly commissioned and qualified, whereby he "did then and there wilfully, unlawfully, knowingly, falsely, feloniously, and contrary to his oath, swear that the condition of Christopher, Knickerbocker & Howard, Private Bank, at the close of business on December 31, 1913, was as follows:" setting out the statement of the resources and liabilities of the bank as stated in the affidavit, and charging that the statement was false in many specified particulars.

The court sustained a demurrer to the information on the ground that it did not state facts sufficient to charge a crime. The state abiding by its pleading, the proceeding was dismissed. The state appeals.

It is conceded that there is no statute of this state requiring an officer of a state bank, or any other person, to make an affidavit of its financial condition such as that set forth in the information. The sole question presented is this: Can a prosecution for perjury in the second degree be successfully predicated upon a written statement, in form an affidavit, voluntarily made but not required by law? The question is one of first impression in this state and merits careful consideration. Appellant takes the affirmative, relying upon the following statutory provisions as found in Rem. & Bal. Code:

"§ 2353. Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree and shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year."

"§ 2354. The term 'oath' shall include an affirmation and every other mode authorized by law of attesting the truth of that which is stated. A person who shall state any matter under oath shall be deemed to 'swear' thereto."

"§ 8298. Every duly qualified notary public is authorized in any county in this state,— . . .

"(3) To take depositions and affidavits, and administer all oaths required by law to be administered; . . ."

The respondent contends that, in order to constitute perjury in the second degree under § 2353, the false oath, whether oral or in writing, must be either required by law or made in a proceeding or investigation authorized by law; citing *State v. Wilson*, 83 Wash. 419, 145 Pac. 455. In that case, the different degrees of perjury are discussed at length. It is there pointed out that our statute, § 2351, defining perjury in the first degree, is but declaratory of the common law and is intended to apply in all cases where the false oath is taken and testimony given in, or in aid of, a judicial proceeding, and that § 2353 defines and subjects to punishment other offenses against truth. But in that case we did not attempt an exhaustive analysis of § 2353, or to define its exact limits. In that case, it was contended by the state that, in so far as perjury may be committed "in a proceeding or investigation authorized by law," perjury in the second degree is included in a charge of perjury in the first degree. It was only in answer to that contention that we said:

"We cannot believe that the legislature ever intended such consequences, but rather, by adopting § 2353, it meant to cover those offenses against truth which occur in extra judicial proceedings and investigations and proceedings and investigations held by *quasi* judicial boards, commissions and committees where a false oath could not be held to be perjury under the theory that it operated as an 'obstruction of justice' as the stream of justice flows in the courts of the state, or in proceedings ancillary or in aid of the jurisdiction of the courts to try and determine public and private controversies. 'Proceedings or investigations authorized by law,'

must be held to mean proceedings or investigations defined by or held under the warrant of the legislative body as distinguished from an offense recognized as criminal at the common law, which is adopted in so far as it is not inconsistent as an integral part of our criminal code."

That this was not intended as marking the definite limits of the crime of perjury in the second degree, as defined by § 2353, is plainly apparent from the much broader language immediately following it:

"It is evident that § 2353 was passed to cover, by general statute, offenses which in some states have been called false swearing, and made punishable *eo nomine* by statute."

A perusal of § 2353 shows that it recognizes two kinds of swearing, namely, voluntary swearing and swearing where the witness may be compelled to testify. The word "volunteer" is plainly used in contra-distinction to the case where the witness, "in a proceeding or investigation authorized by law," may be compelled to testify; otherwise the word "volunteer" would have no meaning. The obvious intent of the statute is to treat voluntary false swearing with the same severity as false swearing in a proceeding or investigation authorized by law. The statement of the two things in the disjunctive makes this plain. When the force of this disjunctive statement is once clearly caught, every shadow of ambiguity vanishes. It is at once manifest that the words "authorized by law" neither have relation nor give a character to the oath of a "volunteer." They are part of the disjunctive phrase and can only qualify the words "proceeding" and "investigation," with which they are juxtaposed. The phrase, "or in a proceeding or investigation authorized by law," may be eliminated without in the least changing or impairing the statute, so far as it applies to voluntary oaths. For the purpose of this discussion, therefore, the statute may be read as follows:

"Every person who, whether orally or in writing, . . . as a volunteer . . . shall knowingly swear falsely con-

cerning any matter whatsoever, shall be guilty of perjury in the second degree . . ."

So read, the statute clearly denounces false swearing by a volunteer, not alone concerning matters where an oath is required or authorized by law, but "concerning any matter whatsoever." Plainer words could not be used to convey that meaning and no other. They compel the conclusion that an affidavit, though not required by law, may be made the basis of a prosecution for perjury in the second degree.

Respondent further argues, in substance, that an oath implies the existence of some form of inquiry required by law; and that an affidavit being a sworn written statement, there can be no such thing as an affidavit unless made to be used in some proceeding, investigation or matter for which provision is made by statute. No authority is cited so holding, and we know of none. On the contrary, the very next section of the statute (§ 2354) defines the term "oath" as including "an affirmation and every other mode authorized by law of attesting the truth of that which is stated," and in order that the mode of attestation be not confused with what is stated, it adds: "A person who shall state any matter under 'oath' shall be deemed to 'swear' thereto." There is no possible implication that *any matter* means only such matters as are required by law to be so stated.

The plain purpose of § 2353 is the prevention by punishment of reckless, voluntary, false swearing, upon the faith of which others may act to their injury, as well as to prevent false swearing in extra judicial proceedings or investigations, and in proceedings or investigations authorized by law held by *quasi* judicial boards, committees and the like having the power to compel the attendance of witnesses. The legislature evidently recognized that there is as much moral turpitude and may be as great resulting injury in the one case as the other. When the extensive use of sworn statements and affidavits in the business world, though not required by law, is remembered, when the prior law, the mis-

chief and the remedy are considered, it is clear that the legislature used the broad language of our statute advisedly, to the end that the sanctity of the oath might be preserved and that no wilfully false oath concerning any matter whatsoever might be used to another's detriment with impunity.

But respondent earnestly contends that a purported oath is not an oath unless taken before some person authorized by law to take it. This must be conceded. But his further equally earnest contention, that in this state a notary public is not authorized to take an affidavit not required by law, cannot be sustained. The statute, Rem. & Bal. Code, § 8298 (P. C. 365 § 7), defining the powers of a notary public, authorizes that officer "to take depositions and affidavits, and administer all oaths required by law to be administered." It does not say "all *other* oaths required by law" so as to include affidavits in that category. It clearly treats "oaths required by law to be administered" and "affidavits" not as synonymous, nor as the one including the other, otherwise the use of the word "affidavits" would be meaningless, tautological, and worse than unnecessary, because serving merely to confuse. Both in fact and in law an affidavit is something different from an oral oath. It is defined as follows:

"An 'affidavit' is a statement in writing declared to be true by the party making it and certified to have been sworn to before him by the officer who takes it." 1 Words and Phrases (2d series), 147.

"Affidavit. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation." 1 Bouvier, Law Dictionary (Rawle's 3d Revision), 158.

"Affidavit. A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." Black, Law Dictionary (2d ed.), 46.

An affidavit is not only a written oath, but a statement of the things sworn to. It is matter of common knowledge that

from time almost immemorial affidavits have been used in business, though not required by law, whenever a solemn, formal asseveration upon which others might rely was intended. Familiar examples are affidavits touching titles to property, affidavits of financial condition for the purpose of obtaining credit, affidavits touching the pedigree of animals, sworn bank statements, and statements of the financial condition of other corporations. We must assume that the legislature, when it enacted the above statute, was possessed of knowledge of this wide and customary use of the affidavit in business matters generally. It is matter of common knowledge also that notaries have long been in the habit of taking affidavits of this character, and this, too, the legislature must be presumed to have known. This is not a criminal statute calling for a strict construction, but a statute touching the powers of an officer whose employment in the taking of affidavits touching purely business matters, though not required by law, had long existed by custom. Obviously the legislature, in passing this law, did not intend to restrict but to recognize that custom. Such is the plain, natural and practical meaning of the statute itself. Such was the plain purpose of using the word "affidavits," as well as "oaths required by law to be administered." The statute being intended to declare the powers of a notary generally, there is no warrant, either in law or logic, for construing them more narrowly merely because they become important in a criminal prosecution. Respondent, relying upon our decision in *State v. Dallagiovanna*, 69 Wash. 84, 124 Pac. 209, 40 L. R. A. (N. S.) 249, urges that the question is no longer an open one in this state, and that we there decided in so many words that "a notary public cannot administer any oath with any binding force in law, except such oath is 'required by law.'" In that case, however, we were speaking of an oral oath, not of an affidavit, and the statute is clear that it is only in connection with such oaths that the authority of the notary is limited to oaths required by law to be ad-

ministered. The language there used must be confined to oaths of the character there involved. Respondent's argument ignores the fact that the statute uses the word "affidavits" in defining the notary's authority in the premises.

As pointed out in *State v. Wilson, supra*, the crime of perjury in the second degree is closely analogous to the statutory crime of false swearing in some of the other states. Under the penal code of Texas, false swearing is defined as follows:

"If any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing . . ." White's Penal Code (Texas), art. 209.

The only difference between that statute and our statute defining perjury in the second degree is that, in addition to voluntary oaths or affidavits not required by law, there denounced, our statute includes any voluntary oath or affidavit, and any oath or affidavit made or taken in a proceeding or investigation authorized by law. Under the Texas statute, it was held, in *Davidson v. State*, 22 Tex. App. 372, that a county clerk who was authorized by statute "to administer all oaths and affirmations and to take affidavits and depositions, to be used as provided by law in any of the courts," and who was also generally empowered to take affidavits, could take a voluntary affidavit not required by law, and that the maker of such an affidavit before the clerk, which affidavit was false in fact, was liable to prosecution, not for perjury, but for false swearing. The court said:

"The distinction between perjury and false swearing is this, viz.: If the false statement be made in an oath or affidavit 'required by law,' or made in 'the course of a judicial proceeding,' the offense is perjury; if the false voluntary oath or affidavit is 'not required by law or made in the course of a judicial proceeding,' then it is false swearing."

Since, as we have seen, our statute defining perjury in the second degree includes voluntary false swearing "concerning any matter whatsoever," the *Davidson* case furnishes direct authority for the holding, not only that a notary, under a statute such as ours, is authorized to take affidavits not required by law, but that the voluntary maker of a false affidavit before a notary is, in this state, subject to prosecution for perjury in the second degree. See, also, *O'Bryan v. State*, 27 Tex. App. 339; *Urben v. State* (Tex. Cr.), 178 S. W. 514.

A review of the many authorities cited by respondent in support of the general rule that a charge of perjury cannot be based upon an oath not required by law would be a bootless task, since the various statutes involved were evidently not like ours.

It is true, as urged by respondent, that if there is a reasonable doubt as to the law the courts will resolve that doubt in favor of the innocence of the party charged, but our statute punishing voluntary false swearing "concerning any matter whatsoever" is too clear in its intent to admit of construction.

The judgment is reversed, and the cause is remanded for further proceedings.

MORRIS, C. J., FULLERTON, CHADWICK, and MOUNT, JJ., concur.

[No. 12186. *En Banc.* June 16, 1915.]

E. M. GORDON *et al.*, *Respondents*, v. C. D. HILLMAN *et al.*, *Appellants*.[1]

EVIDENCE—PAROL TO VARY WRITING—ADMISSIBILITY. Evidence of an oral agreement contradicting a clause in a written contract that the parties had investigated the properties to be exchanged, is admissible in an action for rescission, upon an allegation of fraud in procuring the contract, and to show that the contract actually entered into was fraudulent and void.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. The admission of incompetent evidence is not prejudicial error, where the cause is triable *de novo* on appeal.

EXCHANGE OF PROPERTY — RESCISSION — FRAUD—EVIDENCE—SUFFICIENCY. A judgment for rescission of an exchange of properties is sustained where it appears that plaintiff was grossly overreached by false representations, that notes given for a face value of $47,000, as part consideration, were practically worthless, that, though the contract recited that both parties had examined the properties and were satisfied, the complainant understood it as a tentative agreement, under which he would have an opportunity to investigate titles and securities and he offered to rescind within two weeks, as soon as his investigation had disclosed the unconscionable nature of the transaction.

VENDOR AND PURCHASER—MISREPRESENTATION OF VENDOR—CAVEAT EMPTOR. The rule of *caveat emptor* should not be extended so as to deny remedy to an improvident purchaser against false representations accompanied with unconscionable gains on the part of a fraudulent vendor.

VENDOR AND PURCHASER—RESCISSION—TENDER OF INTEREST. Upon seeking rescission, failure to tender interest payments made by defendants would not defeat a judgment for plaintiffs, especially where the payments were nominal in amount and were taken care of in the decree of the court.

HOLCOMB, MAIN, PARKER, and CHADWICK, JJ., dissent.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 28, 1914, in favor of the plaintiffs, in an action for rescission, tried to the court. Affirmed.

[1]Reported in 158 Pac. 96.

Gay & Kelleran, for appellants.

Byers & Byers, for respondents.

FULLERTON, J.—On July 7, 1913, the respondents and the appellants entered into a written agreement for the mutual exchange of certain properties. The agreement described the property to be exchanged in detail, provided that the title to the several properties should be passed by deeds and assignments on the day following the execution of the contracts, that abstracts to the title to the real property to be exchanged should be furnished within ten days thereafter, and that each party should cure any defect in the title to the property conveyed by them that should be shown in the abstracts. The agreement also contained the following recital:

"It is agreed that both parties hereto have personally examined and inspected the respective properties received by such parties in this exchange, and each party hereby declares himself satisfied from such personal inspection and examination as to the quality of the property to be conveyed and delivered to him under this agreement and hereby acknowledges his satisfaction and approval of such property from such personal examination, inspection and approval."

The title deeds, bills of sale, and assignments necessary to pass the title to the properties as agreed upon were exchanged on the day agreed upon, and the abstracts also were delivered within the time specified in the agreement, and some defects discovered in the titles were corrected. During the course of the investigation, however, the respondents conceived that they had been overreached and defrauded in the transaction, and thereupon sought a rescission of the agreement with the appellants. The appellants refused to make a rescission, whereupon the respondents, on July 24, 1913, began the present action to enforce rescission. Recovery was had by the respondents after an extended trial, and this appeal is from the judgment entered.

The errors assigned by the appellants which present questions of law relate principally to the admission of evidence thought to be incompetent. It is claimed, for example, that evidence tending to impeach and vary the terms of the written contract was admitted; and particularly is it objected that the respondents were permitted to deny that they had examined the property agreed to be received in exchange by them and that they were satisfied as to the quality and value thereof. But the contention overlooks the fact that the respondents alleged that the procuring of this contract was a part of the scheme to defraud them of their property. Under such an allegation, it was competent to show all of the circumstances surrounding the transaction—oral promises and agreements contradicting and varying the writing, as well as all the other matters—not for the purpose of showing a different contract from that actually entered into, but for the purpose of showing the contract actually entered into to be fraudulent and void. The pertinency of the evidence particularly objected to is made clear by a simple recital of the facts. The respondents had not, at the time of the execution of the contract, examined all nor any considerable part of the property they were to receive in exchange as to its "quality and value," or otherwise, a fact which the appellants well knew at the time they insisted that a clause to that effect should be inserted in the contract. Clearly, under such circumstances, the recital does not estop the respondents from showing the fraudulent nature of the contract.

Objections made to certain other parts of the evidence are more pertinent, this because the evidence had no bearing upon the issues. But the admission of incompetent evidence in a cause tried by the court sitting without a jury is not a cause for a new trial, nor a ground for reversing the judgment entered and directing a judgment for the other party. Cases of this sort are triable here *de novo*, and can be reversed or modified only when the evidence properly in the record fails to sustain the judgment entered. The court dis-

cards the improper evidence and determines the cause from that which it deems pertinent to the inquiry. The ultimate question in the present record therefore is, Does the evidence pertinent to the inquiry sustain the judgment of the trial court?

Passing to the question of the sufficiency of the evidence, its perusal leaves no doubt in our minds of the fact that the respondents were grossly overreached in the transaction, and this because of the false representations of the other parties. The trade, as measured by the values put upon the properties by the respective owners, was of considerable magnitude. The respondents' property for the greater part consisted of improved income bearing property, situated in or near the business district in the city of Seattle, and had an immediate as well as a prospective value. It was incumbered for some $60,000, and while the respondents' valuation of $125,000 in excess of the incumbrance may have been exaggerated, other evidence in the record makes it clear that it had a considerable margin of value in excess of the incumbrance, possibly an excess of $60,000. The property given in exchange by the appellants consisted of notes of the face value of $60,000; lots in sundry additions in the suburbs of the city of Seattle valued at $35,000; certain tide lands at Olympia, of which the appellants held only contracts of purchase, valued at $25,000, and certain logged-off lands in Thurston and Mason counties valued at $10,000. The notes were shown to be of little or no value. One of them was for $27,000, was practically unsecured, and a judgment existed against its maker for a sum exceeding $100,000. Another was for $20,000, secured by a mortgage on certain lots in an addition to Seattle known as the Meadow Gardens tract. These lots were once owned by the appellants. They had conveyed them to one Hazen Chase at "trade prices," taking a mortgage back for the entire purchase price. Chase, on making the purchase, had expected to sell the lots to individual purchasers at a price in excess of the trade

price and thereby make a profit for himself. This scheme he had long since abandoned. The mortgaged property represented the only value the note had, and this the evidence abundantly satisfies us was grossly disproportionate to the amount of the note. Of the real property transferred from the appellants to the respondents, none was improved or income bearing, and none of it had any definite or fixed market value. Its value as a whole the evidence does not make very clear, but enough is shown to convince us that it bore no reasonable ratio to the value fixed upon it for the purposes of exchange, or to the value of the property given in exchange for it.

We think, also, that the evidence makes it clear that the respondent having charge of the negotiations was acting under a misapprehension as to the effect of his acts when he signed the contract and made the exchange of conveyances. It seems to us that he thought that these were only tentative arrangements, that the papers were to go in escrow, and that the final consummation of the deal was to take place when the abstracts were furnished and the title and values of the property were examined and approved; and further, that, had it been made known to him that these several acts were in themselves a consummation of the transaction, he would not have signed the contract nor delivered over the conveyances.

The more difficult question is whether he exercised that degree of diligence in the protection of his rights which the law compels him to exercise before he can be heard to complain of having been overreached and defrauded. But on this question, also, we are inclined to follow the conclusion of the trial court. The conduct of the respondent was in some respects as guileless in its simplicity as would be that of a child. But the fact remains that he and his co-respondent would be grossly defrauded if the exchange he agreed to make should be consummated. And while it is true the law does not look with favor upon improvidence and negli-

gence, it looks with much less favor upon that species of avarice which seeks to gain by preying upon improvidence and negligence. This especially is the rule of the more modern cases. False representations accompanied with unconscionable gains are held remediable even though the victims of the representations may not have exercised all of the diligence once thought necessary to escape the common law idea of *caveat emptor*. As we said in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102:

"Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*. Thus in *Strand v. Griffith*, 97 Fed. 854, the court said:

" 'There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' "

The contract provided that a certain note having a face value of $2,000 should be turned over to the brokers conducting the exchange, in satisfaction of the part of the commissions the respondents had agreed to pay. The note was valued in the exchange at $1,000, and in the decree the court directed that the appellants be paid that sum by the respondents in lieu of a return of the note. This was thought to be erroneous, but we think the sum awarded all that the appellants are entitled to recover. To charge the respondents with the face value of the note would be to charge them with commissions which the appellants are obligated to repay to them.

The failure to tender certain interest payments made by the appellants does not prevent a rescission. These were but nominal in amounts when compared with the total of the transactions, and were, moreover, properly taken care of in the decree of the court.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, J., concur.

ELLIS, J., concurs in the result.

BAUSMAN, J. (concurring)—I concur with Justice Fullerton. We have here to do with a bargain of considerable magnitude made between a rascal and one who has behaved like a fool. That Hillman was a man of bad character was known to Gordon, who deserves little sympathy, but who acted with such promptness in rescission as not to be exposed to the doctrine of acquiescence that would shut his mouth against complaint. The properties that Hillman was giving were such as could not speedily be examined, while those of Gordon were known beforehand by Hillman and could be estimated with very little delay, yet it was not until the very signing of the bargain that Gordon knew definitely what was to be offered, and it is not to be denied that some form of investigation, such at least as looking into titles, was to be left him. His rescission, moreover, was made before he so much as recorded the instruments. So far as the real estate was concerned, the values on each side were so much inflated that a balance is not easy to strike. But upon the note, it is clear that Gordon received much the worst of the bargain, and that there was a good deal to be learned about them which he did not know and which Hillman concealed from him at the time of the exchange. One note was of $27,000 and another of $20,000. The two put together are probably not worth $5,000. Some other notes were equally bad. It is inconceivable that Gordon was not to have some little further time to check the value of the collateral which was necessary to make good the face obligations of the

makers. That this collateral proved utterly wretched in some aspects of it not before revealed is clear. I agree with Justice Fullerton, without further elaboration of details, that Gordon was very much overreached. He would, to be sure, be entitled to little assistance from a court were there in the case any circumstance of ratification or acquiescence, which, however, I do not find, notwithstanding he did not, on the first suspicious circumstances after the transaction, immediately rescind. He did rescind and offer back the unrecorded securities within a fortnight. This I consider very prompt under the circumstances.

HOLCOMB, J. (dissenting)—To my mind, neither the reasoning nor the result reached in this case is sound or consistent.

The facts of record in the case show, that these parties dealt as strangers, at arm's length; respondent Gordon was a man in the prime of life and of great business ability and experience; he himself selected the properties in controversy from a long list of properties, and he had examined most of the properties he selected, and had, or by the exercise of reasonable care and prudence could have, examined and satisfied himself as to the character and values of every other item. There were no "badges of fraud."

Possibly respondent made an improvident bargain. I am not concerned with the result reached of setting that bargain aside. But bargains are not to be set aside merely because they were improvident. The facts in this case are in no wise similar to the facts in the leading and very justly decided case of *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102, cited in the majority opinion, and other similar cases; nor to the facts in such cases as *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799. But the facts in this case are similar to the various phases in such cases as *Baker v. Bicknell*, 14 Wash. 29, 44 Pac. 107; *Griffith v. Strand*, 19 Wash. 686, 54 Pac.

613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299; *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B 1069.

To be consistent, this case should follow these last cited cases. The judgment should be reversed.

I therefore dissent.

MAIN, PARKER, and CHADWICK, JJ., concur with HOLCOMB, J.

[No. 12225. Department One. June 16, 1916.]

C. A. GWINN, *Respondent*, v. L. A. FORD, *Appellant*.[1]

CORPORATIONS — STOCK — SALE — FRAUDULENT REPRESENTATIONS — MATTERS OF FACT. False representations made to induce the purchase of corporate stock, to the effect that the seller was intimately acquainted with the affairs of the company, that he knew that the stock was of greater value than the price at which it was selling, that he knew the price would rise in a few days, and that he knew where the stock could be sold at a marked increase, were representations as to matters of fact, and not as to matters of opinion.

BILLS AND NOTES — ACTIONS — DEFENSES — FRAUD. In an action on promissory notes by an indorsee, an answer alleging that the notes were procured by fraudulent representations, the result of a conspiracy between the payee and the plaintiff to whom the notes were immediately indorsed, and that plaintiff was at all times advised as to the contract under which the notes were given, sets up a good defense.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 30, 1914, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defenses, in an action on promissory notes, tried to the court. Reversed.

Mulligan & Bardsley, for appellant.

J. N. Pickrell and *Joseph Rosslow*, for respondent.

[1]Reported in 158 Pac. 536.

ON REHEARING.

PER CURIAM.—This case is before us upon a rehearing. It was first heard at our January session of 1915, at which time no appearance was made by the respondent. On May 27, 1915, an opinion was handed down reversing the case and remanding it for further proceedings. *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891. Subsequently the respondent made a showing to this court to the effect that he had, in due time, prepared and filed with the clerk of the lower court his answering brief on the appeal, and that for some cause, through no fault of his own, it was not forwarded to this court, the result being that he received no notice of the time the cause was set for oral argument in this court and, for that reason, did not appear at such time. The rehearing was granted because of this showing.

The facts are fully stated in our former opinion. It will be observed therefrom that the case turns on the question whether the facts set forth in the answer, to which a demurrer was sustained, constitute a defense to the notes sued upon. We think it unnecessary to repeat the allegations of the answer here at length. In substance, it is alleged that the person procuring the notes from the appellants represented to them that he was intimately acquainted with the affairs of the company whose stock he was selling; that he had inside information from which he knew that the stock was of much greater value than the price at which it was selling, and that it would rise in price within a few days; that he knew where the stock could be sold in a short time at a marked increase over the price at which it could then be purchased, and that a profit could be realized to the appellants by a mere loan of their credit. It is further alleged that the stock was then and at all times intrinsically valueless and had no market value, and that the representations were made as the result of a conspiracy to wrongfully deprive the appellants of the notes; that the respondent was

cooperating with the person who procured the notes, and was at all times advised as to the contract under which the notes were given.

The representations by which the notes were procured are, to our minds, representations as to matters of fact, rather than representations of matters of opinion, as the respondent argues. It appears to us, also, that if they be proven as alleged, and it be further proven that the respondent either participated in the representations or knew of the fact that the notes had been obtained because of the representations, at the time they were indorsed to him by the person procuring them, he cannot recover thereon.

Our conclusion is that our former opinion correctly determined the question submitted by the appeal. The judgment is therefore reversed, and the cause remanded for further proceedings.

[No. 12842. Department One. June 16, 1916.]

A. J. COLE, *Appellant*, v. W. A. CARRUTHERS, *Respondent*.[1]

BROKERS — COMMISSIONS — ABANDONMENT OF EMPLOYMENT. A broker is not entitled to a commission on a sale of property to a customer first introduced by him, where the sale was not effected until after the employment had been abandoned by the broker.

BROKERS—COMMISSIONS—ABANDONMENT OF CONTRACT. A broker is not entitled to a commission on a sale of property, where after his abandonment of the employment, a person whom he had introduced to the vendor as a customer negotiated a sale to a third person, who gave the negotiator an option to purchase a certain interest in the property.

Appeal from a judgment of the superior court for Pacific county, Edward H. Wright, J., entered June 22, 1914, upon findings in favor of the defendant, in an action for a broker's commission, tried to the court. Affirmed.

[1]Reported in 158 Pac. 75.

Hewen & Murray, for appellant.

Welsh & Welsh and *M. M. Richardson*, for respondent.

FULLERTON, J.—This is an action brought by A. J. Cole against W. A. Carruthers to recover upon a claim for a broker's commission. The trial, which was had by the court sitting without a jury, resulted in a judgment in favor of Carruthers. From this judgment, Cole appeals.

In the year 1911, and for some years prior thereto, a corporation organized under the name of Carruthers & Heuston, Incorporated, was engaged in the business of growing and marketing oysters, and owned and controlled in connection with its business extensive oyster beds in Willapa Bay, together with personal property of considerable value. Of the capital stock of the corporation, Carruthers owned and controlled one-half; the other half being owned by May N. Heuston and F. Z. Heuston. Carruthers was president of the corporation, and F. Z. Heuston secretary. The corporation was desirous of selling its properties. In October, 1911, the parties listed the property with the appellant, Cole, for sale, he being at that time a real estate broker engaged in business in the city of Seattle. Later on, namely, on December 23, 1911, Carruthers gave to Cole a written agreement to pay him a commission in case of a sale of the property, the agreement being in the following language:

"South Bend, Washington, Dec. 23, 1911.

"To A. J. Cole,

Seattle, Washington:

"In consideration of the services to be performed by you in endeavoring to effect a sale of the oyster business known as Carruthers & Heuston, Incorporated, I hereby agree to pay you a commission of $2,000 for effecting such sale, and in the event of sale being effected of the one-half interest thereof owned by me, I agree to pay you a commission of $1,000.

"Should you apprise me of the identity of your client or prospective purchaser, or send him to me, I agree to assist

in every possible way to effect a sale of said property, and in the event of a sale being consummated with him through you, or by me independent of you, I agree to pay you the commission above named the same as though the sale was made entirely by you. W. A. Carruthers."

After listing the property, Cole called it to the attention of one H. Rowland, who, with Cole, undertook to find a purchaser for the property. It is Cole's contention that Rowland first represented to him that he had ample means of his own by which to make the purchase, but afterwards informed him that these funds were not immediately available and that he would have to enlist his friends in the enterprise. Later on, Rowland went to California with the object of finding a purchaser, but met with no success. The parties together then undertook to sell it to investors in Seattle and elsewhere, pursuing the purpose with some energy for a number of months without success. They then jointly took an option on the property to purchase it themselves for $60,000, but this also fell through because of the inability of the purchasers to make a sufficient cash payment to satisfy the owners of the property. At this place in the negotiations, according to Rowland and the officers of the corporation, Cole abandoned the project, saying that he was through and would not expend further time upon it. This was some time in the latter part of March, 1912.

Later on, in July, 1912, Rowland and one C. Branch White organized a corporation called the Long Island Oyster Company, and later in the same month this corporation took over the property on terms satisfactory to the seller. Rowland advanced nothing towards the capital stock of the new corporation, but was given an option to purchase a certain number of shares at a future date. He was also made its manager, and as such has charge of the property purchased. White was not one of the persons with whom Cole attempted to deal. In fact Cole himself testified that he had

never met White, and it was testified by Rowland that he had interested White in the enterprise after Cole had abandoned his efforts to sell the property to an independent purchaser, or to purchase it in conjunction with Rowland.

It is Cole's contention that Rowland was his customer, introduced to the seller by him, and that, since the sale was made to Rowland and other parties whom Rowland interested in the enterprise, it is a sale to his customer, and he is entitled to recover under the terms of the written agreement. But we agree with the trial court that this claim is without foundation. Rowland, if he ever was Cole's customer, was not such at the time the sale was made. Cole had long since quit dealing with Rowland. He had long since given up his efforts to sell the property. The commission agreement was then at an end, and even if the property was subsequently sold to his former customer, the fact did not so far revive the agreement as to make the promisor liable thereunder.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and ELLIS, JJ., concur.

[No. 12922. Department Two. June 16, 1916.]

FRANCES POST, *Respondent*, v. FREDERICK TAMM, *Appellant*.[1]

EVIDENCE—PAROL EVIDENCE—BILLS AND NOTES—CONDITIONS SUBSEQUENT. In the absence of fraud, a contemporaneous oral agreement providing for the surrender of a promissory note upon the execution by the promisor of a will making the payee a legatee to the extent of the face value of the note cannot be shown as a defense to an action upon the note.

APPEAL — REVIEW — PLEADINGS. Rulings of the trial court in settling the pleadings are not material on appeal, where the appellant was permitted to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or not.

PLEADING—AMENDMENT—CONDITION OF CAUSE. The denial of a request to amend a pleading was not error, where it was not presented until after the cause had been tried and the court had announced its ruling.

Appeal from a judgment of the superior court for Snohomish county, Brawley, J., entered March 23, 1915, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on a promissory note. Affirmed.

E. C. Dailey and *Clifford Newton*, for appellant.

Sherwood & Mansfield, for respondent.

MAIN, J.—This action was brought upon a promissory note. The issues were framed by the complaint and seventh amended answer and the reply thereto. The complaint prayed for judgment upon the note. The answer prayed for a rescission. By order of the court, the cause was tried to a jury acting in an advisory capacity. At the conclusion of the defendant's evidence, the plaintiff moved for a directed verdict. This motion was sustained, and a verdict was returned under the direction of the court. From the judgment entered, the defendant appeals.

[1]Reported in 158 Pac. 91.

The note was for the sum of $4,000, and was executed and delivered on July 25, 1912, and by its terms was due twelve months after date. The execution and delivery of the note is admitted. There is no evidence in the record from which it can reasonably be inferred that the appellant did not have the capacity to make the note. Neither is there any evidence upon which fraud could be predicated.

The principal defense offered against the note was an oral agreement contemporaneous with the execution and delivery of the note, to the effect that the appellant intended subsequently to make a will in which the respondent was to be a beneficiary to the extent of $4,000, and that the note was to be held until the will was executed, when it was to be returned to the appellant.

The rule is well settled that, in the absence of fraud or mistake, a contemporaneous oral agreement limiting or exempting the maker of a note from liability cannot be shown as a defense to an action upon the note. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, it was said:

"It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability . . ." [Citing authorities.]

The rule which permits oral testimony for the purpose of showing that a note had never been delivered, and was not intended to take effect until the happening of a certain event, is not here applicable. That rule relates to a condition precedent. In the absence of the condition being performed, there is no valid delivery of the note, and hence no obligation as between the parties.

In this case the execution and delivery of the note is admitted and the obligation thereof recognized; and, for the purpose of defeating it, reliance is placed upon a contemporaneous oral agreement by which a condition not precedent, but subsequent, was offered to defeat liability. If a

contemporaneous oral agreement providing for the surrender of the note upon the happening of a condition subsequent could be used to defeat recovery upon a note, the rule which provides that a note or other written contract cannot be varied or modified by such an agreement would be abrogated.

Some reference is made in the briefs to the rulings of the trial court in settling the pleadings. Whether the rulings upon the original answer and the first six amended answers were erroneous is not now material. Upon the trial, the appellant was permitted to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or in the prior pleadings. In the case of *Fishburne v. Robinson*, 49 Wash. 271, 95 Pac. 80, it was said:

"The questions relating to the pleadings are moot questions in this court, as the trial court did not deny the appellant the right to introduce evidence on any matter constituting a defense, whether included in the pleadings as finally settled or not."

After the court had announced its ruling upon the motion for a directed verdict, the appellant requested leave to file another amended answer in which he desired to plead certain facts which he claimed would show failure, or partial failure, of consideration for the note. This request was denied. In this there was no error. The cause had been tried, the defendant had rested, and the court had announced its ruling. If there were facts which would show failure, or partial failure of consideration, it would seem that the appellant had ample opportunity to plead the same before the cause went to trial upon the issues framed and before he had rested his case.

The judgment will be affirmed.

MORRIS, C. J., BAUSMAN, PARKER, and HOLCOMB, JJ., concur.

[No. 13109. Department Two. June 16, 1916.]

INTERIOR WAREHOUSE COMPANY, *Respondent*, v. J. W. HAYS, *Appellant*.[1]

AGRICULTURE—LIENS—FARM LABORERS — ENFORCEMENT — PARTIES. A farm laborer's lien against a crop of wheat is lost as against a purchaser not served with summons in foreclosure proceedings within eight months after filing the claim, in view of Rem. & Bal. Code, § 1190a, applying the provisions of the code for the enforcement of logging liens to farm laborer's liens, wherein it is provided (Id., § 1171) that no lien shall be binding longer than eight calendar months, unless a civil action be commenced within that time to enforce the same.

PROCESS — NECESSITY — KNOWLEDGE OF INSTITUTION OF ACTION. Knowledge of the pendency of an action to foreclose a lien would not be sufficient to give a court jurisdiction to render judgment binding upon a person not served with process.

SHERIFFS AND CONSTABLES — WRONGFUL EXECUTION — LIABILITY. Where a sheriff takes property from the possession of one not a party to the judgment, he is liable for the seizure, though acting under an execution issued on the judgment.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered March 18, 1915, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Affirmed.

Edward A. Davis, for appellant.

Driscoll & Leonard, for respondent.

MAIN, J.—The purpose of this action was to recover damages for the conversion of one hundred and seventy-two sacks of wheat. The cause was tried to the court without a jury, and resulted in findings of fact and conclusions of law and a judgment in favor of the plaintiff for the sum of $288.62. From this judgment, the defendant appeals.

No bill of exceptions or statement of facts has been brought to this court. Hence the cause is here for review

[1]Reported in 158 Pac. 99.

only upon the findings of fact, conclusions of law, and judgment.

The facts as stated in the findings, so far as necessary to an understanding of the questions to be determined, are these: During the year 1912, one Theodore Schmidt was in possession of a certain farm in Franklin county, Washington, upon which he raised a crop of wheat. Before harvesting this wheat, Theodore Schmidt mortgaged the same to A. A. Smith and C. W. Smith. Certain parties, known as Galloway and Zumwalt, performed labor in harvesting the crop of wheat. Almost immediately after the grain was harvested and threshed, Schmidt turned over the grain here in question to the mortgagees, who, with the consent of the mortgagor, sold and delivered the grain to the Interior Warehouse Company. After the wheat was sold and delivered to the Interior Warehouse Company, Galloway and Zumwalt filed a notice of claim of farm laborers' lien, and soon thereafter commenced foreclosure of the same. This farm laborers' lien described the wheat involved in this action as being then in the possession of the Interior Warehouse Company. In the foreclosure action, Theodore Schmidt alone was made a party defendant. Neither the Interior Warehouse Company nor the mortgagees in the chattel mortgage were parties to that action. In due time a judgment was entered foreclosing the lien claimed by Galloway and Zumwalt, and directing a sale of the grain by the sheriff. After this judgment was entered, the appellant, acting as sheriff, over the protest and objection of the Interior Warehouse Company, sold the wheat and delivered the same to the purchaser. The proceeds of the sale were in turn paid to Galloway and Zumwalt, the holders of the lien. Thereafter, and more than eight months after the filing of the claim for a farm laborers' lien, the Interior Warehouse Company began the present action against Hays for the value of the grain, upon the theory that he had wrongfully and unlawfully converted it.

The first question is whether the sheriff wrongfully took the grain from the possession of the Interior Warehouse Company, since that company was not a party to the action in which the judgment of foreclosure of the farm laborers' lien was entered. It was upon authority of this judgment that the sheriff sold the wheat and took possession thereof from the Interior Warehouse Company, over its objection and protest.

It may be admitted that, had the Interior Warehouse Company been made a party defendant to the action to foreclose the farm laborers' lien, it could properly have been adjudicated that the rights of the lien claimants were superior to the rights of the Interior Warehouse Company. Rem. & Bal. Code, § 1189 (P. C. 309 § 107); *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303. Section 1190a, Rem. & Bal. Code, provides that all rights secured to the holders of liens upon logs, under chapter 7 of the code, shall inure to the benefit of those holding liens under the provisions of this chapter, and "the said lienholders hereunder, shall have the same right to have their liens recorded, the same right of foreclosure, of joinder of parties, of judgment over against the person primarily liable, and against any person who shall injure or impair their lien or any of their rights, as are above secured to the holders of liens upon logs, under said chapter VII." By this statute, those claiming a farm laborer's lien have the same right of foreclosure as do the claimants for a lien upon logs.

Section 1171, being one of the sections of chapter VII of the code, which covers the subject of liens upon logs and other timber, provides:

"No lien provided for in this chapter binds any saw-logs, spars, piles or other timber, or lumber and shingles, for a longer period than eight calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court, within that time, to enforce the same: . . ."

Section 1138, Rem. & Bal. Code, which is one of the sections devoted to the subject of liens of mechanics and materialmen, provides:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; . . ."

The two statutes just quoted are, to all intents and purposes, the same. In each the lien claimant is required to bring an action upon his claim within the period of eight calendar months after the claim has been filed.

Construing the mechanics' lien statute, this court has held that the statute limits the duration of the lien, and that such lien is lost as to any necessary defendant who is not served with summons within eight months. *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334; *City Sash & Door Company v. Bunn*, 90 Wash. 669, 156 Pac. 854. In the *Davis* case, it was said:

"It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority if the evidence warrants either defense. He is entitled to his day in court upon these matters, within the period fixed by the statute. In this respect there is no valid distinction between necessary parties and proper parties. *Union Nat. Sav. & Loan Ass'n v. Helberg*, 152 Ind. 139, 51 N. E. 916.

"It follows of necessity, that any one interested, whether as owner, mortgagee, lien claimant, or otherwise; any one who may defend against the lien, or show by competent evidence that it is not a lien as against his interest, has the

right to invoke the statute if the action be not commenced *as against him* within the statutory period. So read the better considered authorities in construing similar statutory provisions."

In the *City Sash & Door Co.* case, it was said:

"The owner of property subject to a mechanics' lien at the time of suit is a necessary party to an action to foreclose the lien. The proceeding to establish and foreclose the lien is, in a sense, *in rem*. Jurisdiction of the subject-matter can only be acquired by service, actual or constructive, upon the owner of the interest sought to be subjected and within the statutory life of the lien."

Under the doctrine of those cases, the Interior Warehouse Company was a necessary party to the foreclosure of the farm laborers' lien claimed by Galloway and Zumwalt, unless a different construction is to be given to the statute requiring suit to be begun upon a farm laborer's lien within eight months after the lien is filed, from that given to the statute which requires a suit to be brought upon a mechanics' lien within eight calendar months after the lien has been filed. These statutes being in almost identical language, there seems to be no good reason why they should not be given the same construction.

The Interior Warehouse Company was in possession of the wheat, and had purchased the same, not only prior to the time the suit was begun to foreclose the farm laborers' lien, but also prior to the time the lien claim was filed. It cannot, therefore, be contended that the possession of the Interior Warehouse Company was not known when the suit was instituted. The appellant in this action, which was begun more than eight months after the judgment in the foreclosure action was entered, cannot rely upon the statute which makes farm laborers' liens superior to other liens or encumbrances. The eight months' period having expired, the Interior Warehouse Company had a right to invoke the statute which requires that the action to foreclose the lien be

begun within eight months after the claim for lien is filed. The Interior Warehouse Company not having been made a party to the action to foreclose, and not being served with summons within eight months, the right to the farm laborers' lien claimed by Galloway and Zumwalt as to it had been lost.

It is next claimed that, since the Interior Warehouse Company had knowledge of the pendency of the action to foreclose the lien, that it was its duty to intervene in that action, and, not having done so, it is bound by the judgment. But this contention cannot be sustained. Jurisdiction of the Interior Warehouse Company could only be obtained by service of proper process upon it. The fact that it had knowledge of the pendency of the action did not give the court jurisdiction to render a judgment that would be binding upon it. *Osborne & Co. v. Columbia County Farmers' Alliance Corporation*, 9 Wash. 666, 38 Pac. 160; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

In the case last cited, it was said:

"The respondent, on the other hand, contends that the appellant had at least actual notice of the commencement of the action. We cannot concede for a moment that a court can acquire jurisdiction of the person in that way."

It is finally contended that the appellant is protected as to all acts done by him in selling and taking possession of the wheat, because he acted as sheriff in obedience to the mandate of legal process regular on its face and issued by competent authority. Ordinarily a writ issued to carry into effect the judgment of a court runs only against the parties named therein as defendants, and is not regular on its face so far as it concerns persons not parties to the judgment.

If a sheriff, acting under an execution issued on a judgment, takes property from the possession of one not a party to the judgment, he may be liable for the seizure of such property. *West v. Hayes*, 120 Ala. 92, 23 South. 727, 74 Am. St. 24; *Fish v. Nethercutt*, 14 Wash. 582, 45 Pac. 44,

53 Am. St. 892. In this case, as already stated, the Interior Warehouse Company was not a party to the judgment. It was in possession and claimed to be the owner of the wheat. It had not had its day in court where it could be heard as to the rights claimed prior to the time of the seizure of the wheat. In such a case, the seizure by the sheriff was wrongful, and he becomes liable in damages.

The judgment will be affirmed.

MORRIS, C. J., BAUSMAN, and PARKER, JJ., concur.

[No. 13186. *En Banc.* June 16, 1916.]

FIRST NATIONAL BANK OF MONROE, *Appellant*, v. SNOHOMISH COUNTY *et al.*, *Respondents*.[1]

TAXATION—ASSESSMENT—EXCESSIVE VALUATION—FRAUD. The assessment of the capital stock of a bank at sixty per cent of its actual value according to the basis adopted by the assessor for all personal property assessable for the year will not be set aside as constructively fraudulent, although for the same year real estate, under the biennial assessment of the preceding year, was assessed at only forty-five per cent of its value.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered February 9, 1915, dismissing an action for equitable relief, tried to the court. Affirmed.

J. A. Coleman and *J. M. Hogan*, for appellant.

O. T. Webb, *Percy Gardiner*, and *Joseph H. Smith*, for respondents.

PARKER, J.—The plaintiff, First National Bank of Monroe, seeks a reduction of taxes assessed and levied upon its capital stock for the year 1913 by the taxing officers of Snohomish county. Having tendered to the county treasurer

[1]Reported in 158 Pac. 92.

a sum which it insists is all that is justly due as taxes upon its capital stock for the year 1913, the plaintiff prays that the county treasurer be required to accept such tender in full payment of the taxes for that year, and that he be enjoined from enforcing payment of any additional sum from the plaintiff. Trial in the superior court resulted in judgment denying the relief prayed for and the dismissal of the action, from which disposition of the case the plaintiff has appealed to this court.

Counsel for appellant rest its claim for relief upon the ground that, in the assessment of its capital stock for the year 1913, the county assessor designedly and intentionally valued its capital stock for the purpose of taxation at sixty per cent of its actual cash value, and at the same time designedly and intentionally valued all other property in the county at not to exceed forty per cent of its actual cash value, thus working a fraud upon the rights of the appellant. Such, in substance, are the allegations of the complaint. Upon this theory it is sought to establish appellant's right to the relief prayed for, invoking the holding of this court in *Spokane & Eastern Trust Co. v. Spokane County*, 70 Wash. 48, 126 Pac. 54, Ann. Cas. 1914 B. 641. For present purposes it may be conceded that, if the evidence presented to the superior court in this case to sustain these allegations had been such as to render it clear and certain that a fraud had thus been worked upon the rights of appellant, it would be entitled to relief under the holding of that decision. That case, however, was disposed of upon demurrer, and, of course, upon the assumption that the allegations of the complaint were true.

The merits of the case before us are determinable, not from the allegations of the complaint, but from the evidence and the presumptions against capricious and arbitrary action on the part of the assessor. The assessor who made the 1913 assessments testified, in substance, that he tried to the best of his ability to ascertain the actual value of all property

assessable in that year and then took sixty per cent of such value, which he adopted as the assessed value, that he instructed his deputies to adopt this same rule, and that it was so applied by him as to bank stock and other property assessed in that year. Real property, being assessable biennially in even numbered years, was not assessed in the year 1913. Rem. & Bal. Code, § 9101 (P. C. 501 § 43). As opposed to this testimony of the assessor and the presumptions against his having acted in an arbitrary or capricious manner, we have the testimony of his predecessor in office who made the assessment of the real property in the year 1912, to the effect that, in his opinion, the assessment of personal property made in 1913, other than of bank stock, did not exceed forty-five per cent of its actual value, and that in the year 1912, he assessed the real property at about forty-five per cent of its actual value. By his testimony he seems to regard the value of real property as having decreased somewhat in 1913, so that it would seem to leave the 1912 real property assessment, which, of course, could not be changed in 1913 because not assessable in that year, at a somewhat higher percentage than was actually made in 1912. Upon this testimony, which we regard as all that substantially affects the correct conclusion to be reached by the court, the case was submitted for decision upon the merits. The court reached the conclusion that the showing was not so plain in appellant's favor as to warrant interference with the assessment as made.

We are constrained to agree with the conclusions reached by the trial court. Viewing all the facts disclosed by the evidence, we think they argue only that there is room for honest difference of opinion as to whether or not there was in fact a substantially different measure of value applied to the bank stock of appellant than to other property in the county taxable for the year 1913. Plainly there is no proof of actual fraud on the part of the assessor, and we think the claimed difference in valuation is not so clearly established as to en-

able a court of equity to say that there was constructive fraud as against the rights of appellant in fixing the valuation of its bank stock. *Hillman's Snohomish County Land & R. Co. v. Snohomish County*, 87 Wash. 58, 151 Pac. 96; *Heuston v. King County*, 90 Wash. 200, 155 Pac. 773.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MAIN, ELLIS, BAUSMAN, and FULLERTON, JJ., concur.

[No. 13232. Department Two. June 16, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. AARON SERWE, *Appellant*, ELMER LEWIS COWAN, *Defendant*.[1]

CRIMINAL LAW—TRIAL—URGING AGREEMENT OF JURY. The action of the judge in saying to a jury in a criminal case, which had been called in to inquire of their progress, that "the case is one of considerable importance and it would be some trouble to try it again, and if the jury can consistently, I would like them to agree" would not constitute error, since there was no intimation of his own or the public's opinion as to the merits of the case.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Error in eliciting testimony impeaching a witness for the defense in a criminal prosecution is harmless, where the impeaching testimony was amply sustained by the other evidence in the record.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered October 13, 1915, upon a trial and conviction of robbery. Affirmed.

A. Emerson Cross and *Dan Pearsall*, for appellant.

J. E. Stewart and *O. M. Nelson*, for respondent.

BAUSMAN, J.—Serwe and one Cowan were jointly charged and jointly tried for robbery. Both were convicted, and Serwe appeals.

The state, to show that these two with a third named Welden committed the crime on a certain night, introduced

[1]Reported in 158 Pac. 81.

testimony of those who were robbed, and these related that, before the offense, the three men were seen together near the place of the robbery. Defendants denied all this as well as the crime. Welden then testified for the defense. On cross-examination, he was asked whether he had not stated to one Linsenmire that, if the other two had been at the place of the robbery, he himself must have been there too, because they were together all that night. This he answered in the negative. Being next asked whether he had not made the same statement to one Crist, he denied that also. Thereupon the state, in rebuttal, asked Crist whether Welden had told him that he had been with the others that night, which question, over appellant's objection, he answered, saying that Welden had said so without naming an hour.

It is complained that this, as an impeaching question, was erroneous, because there was not quoted to Crist for contradiction the whole of what had been propounded to Welden and by him denied.

Linsenmire, also called on rebuttal, testified, over defendants' objection, that Welden had admitted to him that he had been with the others that night. This also was assigned as error.

A third error is alleged in the permitting of one Best to testify on rebuttal that he saw the three together that night and many other times besides. Serwe and Cowan for their part had admitted that they two had been together on the night in question, but they had always denied that Welden had been with them at all.

The father of Welden having testified that the latter was at home the night of the robbery and that he had not seen him associating with the defendants, a rebuttal by one Quimby was allowed, that the father had admitted his being sorry his boy had ever associated with the defendants.

Lastly, error is assigned in the court's saying to the jury, when he called them in to inquire of their progress after they had been out all night: "The case is one of considerable

importance and it would be some trouble to try it again and, if the jury can consistently, I would like them to agree." This last we dispose of at once. Nothing in such a remark was improper. It was, on the contrary, the duty of the court to encourage the jury to agree. Not in the slightest did he intimate his own opinion or that of the public as to which side was in the right.

The other questions can be discussed together. All that Welden is supposed to have admitted and all that was to be proved by his presence or association with the others is abundantly covered in other testimony, from which it is impossible to believe this ingredient prejudicial. The time is past when convictions can be set aside for fragmentary error, notwithstanding the entire record will convince a court that a defendant was not harmed by it. When constitutional guaranties are observed this court will be loath to reverse cases for trifles like these. Five witnesses for the state had testified that they saw Welden in the company of the two defendants on the night of the robbery, the four who were robbed identifying Welden positively as one of the robbers. The two defendants were equally identified as the others. They themselves admitted that they two had been together that evening, and it makes little difference that Welden himself, whose being with them they deny, is not a codefendant, for the error, if any, was harmless, even without his being joint conspirator on trial. His statement that if the two defendants were guilty he was because he had been with them, even if believed by the jury, would mean little. In none of this testimony did the state offer a third person's hearsay statement that the defendants did commit the offense. Without deciding whether error occurred, we are satisfied that this is a case for our rule frequently laid down against reversing cases for error not prejudicial.

Judgment affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13283. Department Two. June 16, 1916.]

THE STATE OF WASHINGTON, *on the Relation of the City of Olympia et al., Respondents*, v. OLYMPIA LIGHT & POWER COMPANY, *Appellant*.[1]

STREET RAILROADS—FRANCHISE—ALTERATION. Laws 1889-90, p. 183, § 117, giving municipal corporations power to grant franchises for the use of their streets confers no authority for the alteration of such franchises subsequent to their grant so as to impose additional obligations on the holder in the matter of street paving differing from the conditions of the franchise contract.

STREET RAILROADS — POLICE POWER — STREET PAVING. The police power authorizing a municipality to require a street railway company to keep its tracks in safe condition for the public welfare cannot be extended so as to require the company at its own expense to pave with other material than that laid by it under its franchise contract.

STREET RAILROADS — PAVING — MUNICIPAL POWERS. Cities of the third class are without delegated power, in the absence of express statute, to require railway companies that have constructed their tracks and are operating cars thereon to pave or improve any part of the street on which they are laid.

STREET RAILROADS—FRANCHISES — PAVING REQUIREMENTS. Under ordinance No. 397 of the city of Olympia granting a franchise to a street railway company to lay its tracks in the city streets and plank within the rails and for eighteen inches outside the rails, with the option of adopting such pavement of a permanent character as the city may employ in paving the street, the city has no power to require the company to pave with other material than planking, notwithstanding a provision of the ordinance reserving to the city the right to amend or alter the franchise, "having due regard for the vested rights" of the grantee.

STREET RAILROADS—PAVING—CONSTRUCTION OF FRANCHISE. Under an ordinance granting an extension of a street railway franchise over a portion of the street theretofore not included, and providing that the grantee "shall maintain such paving between the rails of the railway and to a distance of eighteen inches on each side of the same as shall be used by the city in the paving of Fourth street along the line of this road," the term "maintenance" is to be construed as meaning "maintain after construction," in view of the fact that the ordinance further provides that the right of extension shall be subject to the terms of the original franchise wherein it

[1]Reported in 158 Pac. 85.

was provided that the city retained power to pave all streets over which the company might extend its lines, but all such work should be done so as to offer as little obstruction as possible to the operation of the railway.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered August 27, 1915, upon findings in favor of the plaintiffs, in an action for a writ of mandamus, tried to the court. Reversed.

Troy & Sturdevant and *A. J. Falknor*, for appellant.

George R. Bigelow, for respondent.

HOLCOMB, J.—In June, 1890, Olympia, a city of the third class, conferred upon appellant, a public service corporation, by ordinance No. 397, the right to construct, maintain, and operate a street railway upon certain streets, including that portion of Fourth street situated between Eastside street and Puget street. The life of this franchise was twenty-five years. The franchise was accepted by appellant, and later, on September 8, 1891, by ordinance No. 548, the original franchise was extended for a further period of twenty-five years, making the total life of the franchise fifty years. Section 2 of the franchise ordinance provides when the railway shall be begun and completed, and contains the following proviso:

"Nothing in this ordinance, nor any privileges granted thereby, shall be construed to prevent the municipal authorities from grading, paving, sewering, macadamizing, improving, altering or repairing or changing the grade of any of the streets, avenues, or thoroughfares over which the said company may extend its lines, but all such work shall be done so as to offer as little obstruction as possible to the operation of said railway, and the owner or owners of such railway shall, at their own expense, raise, lower, or change its tracks so as to avoid as much as possible the liability to obstruction during the progress of street repairs, improvements or alterations."

Section 6 of the ordinance is as follows:

"The owners or lessees of such railways shall plank that portion of the street occupied by them between the rails and

to a width of eighteen inches outside the rails, and shall keep such planking in good repair during the continuance of this franchise, and such planking shall be laid at the time of the construction of such railways."

Section 16 is as follows:

"The city of Olympia hereby reserves to itself the right to adopt and enforce all necessary ordinances to control the performance of the conditions of this charter, and also of amending, or in any manner altering this charter, having due regard for the vested rights of said Olympia Light & Power Company and its successors and assigns. It also reserves to itself the power to revoke this charter if any of the conditions hereof are not complied with."

On October 5, 1908, the city passed ordinance No. 990, which was accepted by appellant, amending § 6 of ordinance No. 397, to read as follows:

"The owners or lessees of such railways shall plank that portion of the street occupied by them between the rails and to a width of eighteen inches outside the rails, and shall keep such planking in good repair during the continuance of this franchise, and such planking shall be laid at the time of the construction of such railways. Provided, however, that the owners or lessees of such railways may at their option use such material between the rails for a distance of eighteen inches outside the rails as is used by the city in the construction of the street occupied by such railways, but if the material used by the city and adopted by the company under this provision is of a permanent character, such as wood-block, stone or asphalt, then and in that event the space outside the rails to be paved and maintained by the owners or lessees of such railways shall be twelve (12) inches instead of eighteen (18) inches as herein otherwise provided for. Provided, however, the said Olympia Light & Power Company shall within thirty days after being called upon so to do by the city council, elect whether it will pave with such permanent pavement or not, and such election shall be final, and any change to the location or grade of tracks permanently paved under the provisions of this ordinance shall be made at the expense of the city of Olympia."

In June, 1915, the city council attempted to pass ordinance No. 1384, which was regularly passed and published as required by law, but which was never accepted by appellant, and appellant has in no wise acquiesced in or consented to its passage. This ordinance purports to amend § 6 of ordinance No. 397 so as to read as follows:

"The owners or lessees of such railways shall improve and maintain the portion of the street occupied by their said car tracks between the rails and to a width of eighteen inches on the outside of the rails on both sides of said tracks with the same material used by the city of Olympia on the balance of the street along which and upon which said car tracks are laid, and whenever any street within the city of Olympia shall be improved, by paving, the owner or lessee hereunder shall forthwith pave the portion of the street occupied by its tracks between the rails and to a width of eighteen inches on the outside of the rails on both sides of said tracks with the same material used by the city on the balance of said street; the provisions of this ordinance shall apply to any street or portion thereof upon which the city of Olympia has heretofore caused paving to be laid, as well as upon streets or portions thereof where no paving has yet been laid; whenever it becomes necessary under the terms of this ordinance for the owner, grantee or lessee hereunder to pave its said tracks, the city council of the city of Olympia shall notify it so to do by resolution, directing said owner, or grantee or lessee hereunder to forthwith and within twenty (20) days from the passage of said resolution to commence to pave its said tracks in the same manner as the balance of said street along which said tracks extend shall be paved."

In June, 1915, the city council passed an ordinance for the improvement by paving of Fourth street from Eastside to the east city limits, which would include all that portion of Fourth street between Eastside street and Central street occupied by appellant's tracks. This ordinance provides for the paving with asphaltic concrete of all that portion of Fourth street except that portion occupied by the tracks of the appellant, and to a width of eighteen inches on the outside of the rails on both sides of the street car tracks of ap-

pellant. On July 7, 1915, the city council passed resolution M-46, notifying appellant to begin the paving of its tracks with asphaltic concrete on a concrete foundation and for a distance of eighteen inches on each side thereof. By virtue of the amendment to the franchise ordinance of June, 1915, and the resolution above referred to, the city claims a right to require appellant to pave with the same material used by the city, and commenced this action in the superior court to compel by mandamus such performance by appellant.

Fourth street, prior to this time, had never been paved, but had been maintained as a dirt and gravel street. It is a public street, running east and west, and is one of the main thoroughfares of the city of Olympia. Eastside street intersects Fourth at right angles. Puget street intersects Fourth one block east of Eastside street. Central street intersects Fourth street four blocks east of Puget.

The difference in the situation, as regards the controversy between these parties as to paving Fourth street from Eastside street to Puget street and paving from Puget street to Central street, arises from the fact that the appellant constructed its railway and exercised its franchise first only to Puget street under ordinance No. 397. On May 2, 1904, the city passed ordinance No. 816, granting to appellant the right to extend its street railway from Puget street easterly on Fourth street to the city limits. Section 2 of that ordinance, extending the privilege to construct and operate the railway from Puget street to Central street, is as follows:

"The construction of the railway, the franchise for which is hereby granted, shall be commenced within 60 days from the date of the approval of this ordinance, shall be prosecuted without unnecessary delay and completed within 120 days from the date of the approval hereof. Provided, however, that if said railway shall be completed east of Fourth street to Central street within the time herein specified, the time for the completion of the remainder of the road shall be extended one year from date hereof."

Section 3 reads:

"The said Olympia Light & Power Company, its successors and assigns, shall maintain such paving between the rails of said railway and to a distance of eighteen inches on each side of same, as shall be used by the city in the paving of said Fourth street along the line of this road. But should said street be not planked or otherwise paved, then said company may construct such road of gravel and maintain same in a proper and passable condition, and shall plank same at each street intersection if required by the council."

As to this portion of the paving sought to be required by the charter, it is contended that the relator has a right to require appellant to construct pavement of the same material as that used by the city whenever used by the city, as well as to maintain such pavement under the provisions of § 3 requiring appellant to maintain such paving between the rails of the railway and to a distance of eighteen inches each side of same. Appellant, on the other hand, claims that, under this ordinance, it is not required to construct the original pavement, but is only required to maintain such pavement after it is constructed by the city.

Respondent asserts, (1) that the city has independent authority to compel appellant to pave; (2) that the amendatory ordinance No. 1384 does not impair any existing contract, and (3) that the city can require paving to be done under its police power.

The statute of 1890 relating to the powers of municipal corporations, pages 183, 184, provided that the city council should have power to grant such a franchise for the use of the streets of the municipality and to include therein such restrictions as the city council may deem proper. Under such statutory power, undoubtedly the city could enter into a binding contract with the grantee of a franchise to bind both parties to the conditions, and, under the franchise ordinance in question, it would seem that the city council sought to make such restrictions as were then thought to be proper and necessary. If it had such power, undoubtedly the agree-

ment was binding on both parties. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Southern Pac. Co. v. Portland*, 227 U. S. 559.

The ordinance granting the franchise shows that it had in contemplation the amount and character of paving to be constructed in the future and to be maintained by the franchise holder. By § 2 of the franchise ordinance it was provided that the city should have the right to grade, pave, sewer, macadamize, improve, alter, repair, or change the grade of any of the streets occupied by appellant, but such work to be done so as to offer as little obstruction as possible to the operation of the railway, and that the owners of the railway should, at their own expense, raise, lower or change tracks so as to conform to such improvement and so as to avoid as much as possible the liability of obstruction during the progress of street repairs or alterations. Section 6 of the ordinance provided that the owners or lessees of the railway should plank that portion of the street occupied by the railway between the rails and to a depth of eighteen inches outside of the rails, and keep such planking in good repair during the continuance of the franchise. Later, and with the consent of the appellant, § 6 was amended, giving appellant the option of planking between the rails and for eighteen inches outside, as it was required to do originally, or of paving between the rails a foot on each side of the rails with such pavement as was used by the city when it paved the remainder of the street. It would seem that these provisions were intended to cover the entire subject of paving, and that the city did not contemplate any additional burden should be borne by the railway company.

"A subsequent ordinance requiring additional paving impairs the obligation of the contract and is not such an exercise of the police power as will be upheld. So a city ordinance which contains by agreement as to its stipulations a contract by the city with a street railway company to pave certain portions of the street cannot be thereafter so altered

by the legislature as to impose additional obligations upon the company in the matter of paving, even though the code of the state reserves to it the power to control the company's rights, privileges and immunities and to withdraw the franchise." Joyce, Franchises, § 337.

This text is supported by a large number of authorities, particularly from Alabama, Connecticut, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Nebraska, New York, New Jersey, Ohio, Pennsylvania, Texas, Wisconsin, and the supreme court of the United States. Cases to the contrary are cited by respondent. In a Wisconsin case, *Madison v. Southern Wisconsin R. Co.*, 156 Wis. 352, 146 N. W. 492, a street railway company organized long prior thereto had, up to 1892, operated under a franchise requiring it to pave or macadamize any street upon which it should be located, between the rails and for one foot on each side of the rails on the outside of the rails, and to make and keep the track between and one foot on the outside of the rails as good as the street shall be outside of their tracks, and to correspond in surface and improvements with the street outside the track. The franchise was in existence when the paving in question was done, unless repealed by a franchise granted the railway company in 1892, under which it was operating when the work was done. The new franchise was complete and so framed as to cover all features of street railway construction, maintenance, and operation. It was granted to authorize displacement of the old horse-car system by a general electric system, and contained a general repealing clause. The new franchise in general was worded the same as the old one, with such changes as made it adaptable to electricity. The provision with reference to paving between the rails, from the old franchise before mentioned, was not, however, carried into the new franchise. The court accordingly held that a subsequent ordinance requiring the street between the rails to be paved with the same material as was the rest of the street was not an impairment of its franchise contract.

In *State ex rel. Milwaukee v. Milwaukee Elec. R. & Light Co.*, 157 Wis. 121, 147 N. W. 232, it was held that, in case of doubt as to the nature of a provision imposing a duty upon a street railway company under a franchise ordinance enacted pursuant to statute, it is to be construed as a regulation rather than a contract. In that case it appears that there was a statute already in force at the time the franchise was granted for the use of the street for street railway purposes, providing that "every such road shall . . . be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe," and that such a statute affected the construction of an ordinance enacted pursuant thereto to the same extent as if it were expressly written into the ordinance. It was further held in that case that, in regulating the repair and improvement of its streets, a city exercises a legislative function, and it cannot, without express authority from the legislature to do so, contract away its legislative power. It follows, we think, that, in the absence in this state at the time of the granting of the franchise to appellant of such a statute as was relied upon in the Wisconsin case last cited, that case is not in point. It may be noted that there was a vigorous dissenting opinion by three of the judges of the supreme court of Wisconsin to the holding in that case.

The Michigan case of *Detroit v. Detroit United Ry.*, 172 Mich. 496, 138 N. W. 215, is cited by respondent to support its contention. It was there held that it must be a very plain provision, indeed, in a contract which would justify the courts in holding that the power to regulate the paving and kind of paving to be used by a street railway in the portion of a street occupied by it was surrendered; where doubt exists such contracts will be construed against the surrender of such power. In our case, however, the contract is plain, definite, and unequivocal, and the statutory power is equally positive. As was said in *State ex rel. Webster v. Superior*

Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D. 78, L. R. A. 1915C 287, quoting from *Home Telephone Co. v. Los Angeles*, 211 U. S. 265:

" 'It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power.' "

If the rule above announced applies to the matter of fixing rates between a municipality and a public service concern, it certainly would apply to the matter of constructing and maintaining pavement by a public service concern. A number of cases cited by respondent have to do with franchise ordinances where reservations were expressly made by the grantor to enable it to amend, alter, or change the nature of the franchise or rights holden thereunder at any time during the life of the franchise. There is no such reservation in question here. It is true that § 16 of the franchise ordinance expressed a reservation, but only to the following effect: that the city of Olympia reserved the right to adopt and enforce all necessary ordinances "to control the performance of the conditions of the charter, and also of amending, or in any manner altering this charter, *having due regard for the vested rights of said Olympia Light & Power Company, and its successors and assigns.*" It also reserved to itself the power to revoke the franchise if any of the conditions thereof were not complied with. Now, the appellant accepted the franchise and complied therewith by constructing the kind of

pavement where the street was paved that the city then required. It is bound by its franchise so to do. It is not bound by its franchise, and in fact the city contracted with it that it should not be bound, to do anything further.

The very early and leading case in point upon the matter is that of *Chicago v. Sheldon*, 9 Wall. (U. S.) 50. In that case it appeared that, in May, 1859, the city of Chicago conferred upon a street railway company the right to construct a railway, which franchise was accepted and acted upon, which provided, among other things, that the company "as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, shall keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width upon the line of said railway where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city." It was held by the supreme court of the United States that a contract having been entered into between the parties, valid at the time by the laws of the state, no decision of the courts of the state subsequently made can impair its obligation, and that the provisions above quoted did not make the company liable for curbing, grading, and paving the streets with an entirely new pavement. The obligation of the company extended to repairs only.

Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, a case cited and relied on very largely by respondent in its brief and in argument as authority for the proposition that the contract represented by the franchise is not binding, we do not consider as in any way decisive in this case, for the reason that there, as in the Wisconsin cases heretofore discussed, there was a provision of the Iowa code that the charter of the street railway company should at all times be subject to

legislative control and might at any time be altered, abridged, or set aside by law, and that the franchise might be regulated, withheld, or subject to restrictions upon the enjoyment thereof. This provision was in force at the time of the granting of the franchise by ordinance of Sioux City which required the railway company to pave the street between the rails. The legislature, subsequent to the ordinance, passed a law requiring railway companies in such cities to pave one foot outside of the rails, and the city thereupon enacted the ordinance considered in the case cited. It was there held that the reservation of power by the code that the franchise might be regulated, withheld, or subject to restrictions was a condition of the original grant, and that no contract was impaired where the company accepted its corporate power subject to such reservation. Other cases analogous and supporting the text as quoted from Joyce on Franchises, *supra*, which have been examined, are: *Coast-Line R. Co. v. City of Savannah*, 30 Fed. 646; *Parmelee v. City of Chicago*, 60 Ill. 267; *Billings v. Chicago*, 167 Ill. 337, 47 N. E. 731; *Western Paving & Supply Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. 462; *State ex rel. Kansas City v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *State v. Mayor etc. of Paterson*, 37 N. J. L. 412, 50 Atl. 620; *Village of Madison v. Alton, G. & St. L. Traction Co.*, 235 Ill. 346, 85 N. E. 596; *City of Anna v. Northern*, 261 Ill. 538, 104 N. E. 171; *City of Moline v. Tri-City R. Co.*, 262 Ill. 122, 104 N. E. 271; *Enid City R. Co. v. City of Enid*, 43 Okl. 778, 144 Pac. 617; *Harris v. City of Macomb*, 213 Ill. 47, 72 N. E. 762; *Chicago, R. I. & P. R. Co. v. Chicago* (Ill.), 27 N. E. 926.

There can be no doubt that a municipality in this state can require a street railway company to keep its tracks in a reasonably safe condition for the public safety and welfare under the police power, but that is very different from requiring a street railway company, occupying its streets under a franchise contract definite and unambiguous in its

terms, to pave with certain material and in a certain manner, and afterwards, without its consent, to pave with other material and at its own expense.

There is no statute in this state giving to cities of the third class the power to require railway companies that have constructed their tracks and are operating their cars thereon to pave or improve any portion of the street. Without such delegated power, the city of Olympia has none. The statute of 1911, Laws 1911, p. 441 (3 Rem. & Bal. Code, § 7892-1 *et seq.*), provides the manner in which such cities shall proceed to improve the streets, and to provide for the payment thereof from the general fund or by special assessment against the property specially benefited. We have repeatedly held that street railways cannot be assessed for special improvements under statutes which provide that lots, tracts, and parcels of land and other property within such improvement district which shall be specially benefited by the improvement shall be especially assessed therefor, for the reason that the occupancy of such streets by such railways under franchise is not property but merely an easement. *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486; *In re Third, Fourth and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862; *In re Third Avenue*, 54 Wash. 460, 103 Pac. 807. Under the franchise here in question, we are agreed the respondent has no such power or right as it seeks to assert.

As to pavement of the railway between Puget street and Central street, which respondent contends can be required by reason of the ordinance of May 2, 1904, No. 816, heretofore mentioned, we do not think that the requirement therein to maintain such pavement as shall be constructed by the city is equivalent to a requirement to construct such pavement. There are cases cited by respondent as tending to support its view that "maintain" includes "construct," as *Hoar v. Hennessy*, 29 Mont. 253, 74 Pac. 452, where a statute provided that "Co-terminous owners are mutually bound

equally to maintain: (1) The boundaries and monuments between them. (2) The fences between them." The court held that the word "maintain" meant also "construct." But there, of course, could be but one reasonable construction of the word, for there could be no maintenance of fences on the lines without construction, and the owners were required jointly to maintain them.

In *Ex parte Cooks* (Tex. Cr.), 135 S. W. 139, where a statute provided that "the legislature may pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws," the court held that the word "maintenance" included construction, laying out, and repairing, and was not used in its restricted sense. This also is a reasonable construction, for there could be no laws for the maintenance of public roads unless the public road were constructed. To the same effect is the case of *Dallas County v. Plowman*, 99 Tex. 509, 91 S. W. 221. This section of the ordinance in controversy must receive also a reasonable construction. It provides that the grantee of the franchise, its successors and assigns,

"shall maintain such paving between the rails of the railway and to a distance of eighteen inches on each side of same as shall be used by the city in the paving of Fourth street along the line of this road. But should said street be not planked or otherwise paved, then said company may construct such roadway of gravel and maintain same in a proper and passable condition and plank same at each street intersection if required by the council."

When the railway was constructed between Puget street and Central street, Fourth street was neither paved nor planked, and the company did as it was required to do by the ordinance, viz., constructed its roadway of gravel. The word "maintain" does not mean provide or construct, but means to keep up, to keep from change; to preserve; to hold or keep in any particular state or condition. Webster's Dictionary. In some instances it is synonymous with con-

struct, because it must be inclusive of construct in order to make it reasonable and effective. But it is not in this instance. Section 4, of ordinance No. 816, reads as follows:

"The right and franchise granted by this ordinance are granted with all rights and privileges and subject to all the requirements prescribed in ordinance No. 397, except so far as the provisions of this ordinance may conflict with same, in which case the provisions of this ordinance are to prevail."

It is thus seen that the city council made all of ordinance No. 397 not in conflict with ordinance No. 816 a part of the later ordinance, and it is necessary to again refer to ordinance No. 397. Section 2 of that ordinance provided that nothing therein contained should be construed to prevent the municipality from paving in all the streets over which the company may extend its lines, but all such work should be done so as to offer as little obstruction as possible to the operation of the railway. A reasonable construction, therefore, of the word "maintain," as contained in § 3 of ordinance No. 816, is that it does not mean construct and maintain, but simply maintain after construction.

The judgment is reversed, and the cause dismissed.

MAIN, BAUSMAN, and MOUNT, JJ., concur.

[No. 13299. Department Two. June 16, 1916.]

MARTIN A. NORMAN, *Respondent*, v. JERRY MEEKER, *Appellant*.[1]

SALES — CONDITIONAL SALES — REMEDIES OF VENDOR — ELECTION. Upon default by the vendee of a conditional sale contract, the vendor has an election either to disaffirm the contract and retake the property, or to affirm the contract, declare the subsequent payments due, and sue for the purchase price.

SALES—CONDITIONAL SALES—NOTE GIVEN AS CONSIDERATION. The promissory note of a third party, given as the equivalent of cash in making preliminary payment on a conditional sale contract between a vendor and purchaser, is based upon a valid consideration, and hence subject to enforcement by the vendor on a rescission of the contract and a retaking of the property upon the default of the purchaser.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 1, 1915, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

E. N. Eisenhower and *Bates, Peer & Peterson*, for appellant.

Boyle, Brockway & Boyle and *John W. Horejs*, for respondent.

HOLCOMB, J.—The one question here to determine is whether the note of appellant sued on was given by him and accepted by respondent in lieu of cash, as payment and satisfaction *pro tanto* of part of the purchase price under a conditional sale of chattels. It is here a mixed question of law and fact.

On March 24, 1915, respondent sold to one Gregg, for a consideration of $1,000, a confectionery and pool-room business. A conditional sale contract was entered into which stipulated that of the agreed purchase price, "second party

[1]Reported in 158 Pac. 78.

(vendee) has paid a note for five hundred ($500) dollars for 60 days, the receipt whereof is hereby acknowledged." The further conditions of the contract which are material are these:

"And the said party of the second part, in consideration of the personal property, hereby agrees to pay the said party of the first part, at Tacoma, Washington, the remaining principal, with interest at the rate of seven per cent per annum, at the times and in the manner following:

"Twenty-five dollars or more on or before the 24th day of April, 1915, and twenty-five dollars or more before the 24th of each and every month thereafter until the entire principal shall have been paid. . . . In case the said party of the second part, his legal representatives or assigns, shall pay the several sums of money aforesaid, punctually and at the several times above specified, and shall strictly and literally perform, all and singular, the agreements and stipulations aforesaid, according to the intent and tenor thereof, then the said party of the first part will make unto the said party of the second part, his heirs or assigns, upon request at Tacoma, Washington, a bill of sale," etc.

The note referred to, which second party "has paid," was a note signed by appellant, a third party and stranger to the sale transaction, and by Gregg.

The argument of appellant is based upon the numerous decisions of this court, and of other courts similar thereto, that, upon a default by the vendee of a conditional sales contract, the vendor has one of two remedies. He may either disaffirm the contract and retake the property, or he may affirm the contract, declare the subsequent payments due, and sue for the purchase price thereof. But the two being inconsistent, the election of the one bars any right under the other; citing *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073; *Croup v. Humboldt Quartz & Placer Min. Co.*, 87 Wash. 248, 151 Pac. 493; *Rose v. Rundall*, 86 Wash. 422,

150 Pac. 614; *Alden v. Dyer & Bro.*, 92 Minn. 134, 99 N. W. 784; *Greene v. Sinker, Davis & Co.*, 135 Ind. 434, 35 N. E. 262; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028.

The conditional sales contract, providing for payment of $25 or more on or before April 24, 1915, and $25 or more on or before the 24th day of each and every month thereafter, having been broken by the vendee, the installment falling due on May 24, 1913, the same day as the maturity of the note in question, being unpaid, respondent retook the business. It appears that, a few days before the note fell due, the respondent went to Gregg, the purchaser, and told him that if the note was not paid when it fell due, respondent would take the store back. On that day respondent went to the store and found Mr. Gregg there. He asked Gregg what he was going to do. Gregg said: "I am going to throw the whole thing up. I don't want anything more to do with it. I will fix it up with you to-night or to-morrow morning." Respondent said he would take it over then if it suited Gregg, and Gregg replied that suited him.

These facts, appellant contends, place the transaction on all fours with the case of *Croup v. Humboldt Quartz & Placer Min. Co.*, 87 Wash. 248, 151 Pac. 493. In that case, there had been forfeiture declared by the vendor, who also declared the contract invalid. Simultaneously, or immediately afterwards, the vendor sought to suspend the operation of the forfeiture and to stand upon the contract. He allowed the vendee to remain in possession of the property sold while attempting to renew a contract which he had previously declared was not good on account of some defect and which he had also declared forfeited. Upon the failure to renew the contract, the vendee gave up possession and notified the vendor that it assented to his repudiation or rescission of the contract, and it was there held that the vendor could not thereafter bring an action under the contract for the remainder of the purchase price.

Nor is this case analogous to that of *Winton Motor Carriage Co. v. Broadway Automobile Co., supra*, and the other cases of like nature, for the reason that in this case the contract must be construed as a contract reciting a present payment of $500. While it is true that a note was given for that present payment, it was given as cash. The evidence tends to show that the respondent had attempted to deal with the purchaser, Gregg, upon the basis of a cash payment down of $500. Gregg was unable to raise that sum and respondent agreed to take, and did take, the note in suit signed by appellant, who was not a party to the sale, in lieu of and as the equivalent of cash. Thereupon he delivered possession of the store to Gregg, and Gregg entered under his conditional sale contract. That contract bound Gregg to pay respondent the remaining principal, that is, the other $500 over and above the first payment, with interest at the rate of seven per cent per annum, at the times therein stated, which we have heretofore set forth. Should the payments not be made punctually and as specified, then the respondent was authorized to retake the property; and should they be made as specified, then respondent was required, upon the completion thereof, to give to Gregg a bill of sale, etc.

It is contended by appellant that, where a promissory note is given to evidence a payment under such conditional sale contract and the contract is rescinded and the property retaken by the vendor, the consideration for which the note was given has absolutely failed, and such note is no longer a binding obligation upon the party giving the same. To this effect are cited the following cases: *Earle v. Robinson*, 12 Misc. Rep. 536, 33 N. Y. Supp. 606; *White v. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481; *Manson v. Dayton*, 153 Fed. 258; *Perkins v. Grobben*, 116 Mich. 172, 74 N. W. 469, 72 Am. St. 512, 39 L. R. A. 815; *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. 453, and *Minneapolis Harvester Works v. Hally* (Mich), 8 N. W. 597. But all these were cases where the

promissory note given to evidence the payment under a conditional sale contract was the note of the vendee and was included as part of the purchase price conditioned under the contract. In all those cases it was held that, where the consideration for the note has absolutely failed by reason of the retaking of the property by the vendor, the note is no longer a binding obligation. But it was also recognized in most of those cases, as stated in *Manson v. Dayton, supra*, that it is an ordinary provision in contracts of conditional sales, where the vendee shall have made some preliminary payment and shall fail to meet the balance as required, to declare that what has been paid shall be forfeited to the vendor as liquidated damages, and is not inconsistent with the additional right of reclamation. Preliminary cash payments under conditional sales are usually considered as payments for the use and wear of the property while the vendee is in possession. Where, as in this case, the note in question was not included within the conditional terms of the contract but was given as a preliminary payment, the equivalent of cash, we cannot hold that the consideration has failed by reason of the recaption of the property.

The finding of the trial court was that "said note was given as payment and in lieu of cash." We cannot find that the evidence preponderates against that finding, and, in fact, are of the opinion that it preponderates in its favor. Such being the case, the judgment must be affirmed.

MORRIS, C. J., PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 13307. Department Two. June 16, 1916.]

BRADFORD-KENNEDY COMPANY, *Respondent*, v. JAMES BUCHANAN, *Appellant*.[1]

BAILMENT — MANDATARY — LIABILITY — MEASURE OF DAMAGES. A mandatary under a gratuitous bailment to buy logs with his principal's money, which were to be delivered to a shingle mill to be sawn for the principal's account, and the shingles or proceeds turned over to the principal, is liable only for the latter's loss, and not for the whole sum intrusted; nor would the mandatary's departure from the instructions of his principal render him liable for the whole sum intrusted, if his action did not amount to gross negligence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 15, 1915, upon findings in favor of the plaintiff, in an action for conversion, tried to the court. Remanded for further proceedings.

F. D. Oakley and *John E. Gallagher*, for appellant.

Gordon & Remann and *A. O. Burmeister*, for respondent.

BAUSMAN, J.—Tacoma Lumber & Shingle Company, which had been shipping shingles to the plaintiff company in Nebraska and had already executed to it a chattel mortgage, had become embarrassed, and at a certain time the plaintiff's president, one Bradford, consulted with the shingle company's officers at Tacoma as to furnishing it further aid. With Crandall, the president of the shingle company, Bradford had long acquaintance. He had at one time been his employer, so he accepted his suggestion that defendant Buchanan act as a depositary or agent in further advances. The result was a conversation between Bradford and Buchanan in which the latter undertook to act. Two thousand dollars was to be put in his hands by Bradford. With this logs were to be bought as the property of Bradford's company. Whatever the conversation may have been, it finally

[1]Reported in 158 Pac. 76.

was merged in a letter from Bradford transmitting the $2,000, as follows:

"In order to facilitate matters (as I judge from Mr. Crandall's telegram that it needs quick action), rather than wait for draft, am enclosing you voucher for $2,000 as per my agreement with you, i. e. to the effect that the money is to be paid for logs delivered to the mill of the Tacoma Lumber & Shingle Co. to be sawn for our account, shingles or proceeds of same to be turned over to us as soon as sawn and dried, less 75c per M to be paid by you to the Tacoma Lumber & Shingle Co. for sawing, drying, loading, etc.

"Please see that shipments are made as rapidly as possible, and the amount returned as soon as it can be done, without inconvenience to the operation."

Buchanan, depositing the money to his own account, speedily expended the whole in logs which he turned over to the shingle company. Shingles were later shipped to the Bradford company, but no definite testimony is produced as to their quantity. According to defendant's testimony, all these logs seem to have been, as fast as manufactured, turned over in carload lots to Bradford, who, however, relates the receipt of only one. This was, it is admitted, accompanied by the shingle company's draft for payment as if it were not the product of the Bradford company's own logs. This draft he paid, protesting immediately, however, and demanding, in a letter to Buchanan and a communication to Crandall, that the product be shipped and the $2,000 spent according to what he called the terms of the letter.

The shingle company going soon after into the hands of a receiver, plaintiff contends that it has never received any of this $2,000 from Buchanan or the shingle company, either in product or in cash. Buchanan, for his part, shows conclusively that he at least has got none of this money, and that, while he paid some debts of the shingle company, he was acting entirely gratuitously as a friend to both other parties and, as he thought, carrying out terms agreed to by

Bradford in Tacoma and not modified by the letter. In a word, he argues that he believed he was to use this money as a revolving log-purchasing fund, that the Bradford company would demand free shingles only as the shingle company could afford to ship them without immediate payment, that the Bradford company would continue to pay for the shingles if necessary to keep the concern going, and be satisfied if shingles not shipped to it were sold and the proceeds used by Buchanan for the purchase of further logs as the Bradford company's property.

This case comes to us without apparent attempt on either side to develop it to a point where the court could properly decide. We cannot affirm the judgment for all the $2,000 against Buchanan. From the briefs and the record, it is plain that counsel on neither side presented the case upon the sole theory upon which it should be considered, that of a gratuitous bailment or, more properly, what is known as mandate. Under all the authorities, a mandatary is liable only for gross negligence, and while he must not disregard plain instructions, he is not punished when he honestly mistakes instructions. Now at the end of this letter is a qualifying phrase, the money or the proceeds are to be returned as soon as may be "without inconvenience to the operation," nor can we overlook the fact that, as this letter itself shows and as the circumstances fully disclose, Crandall was not to be without some part in this business. Moreover, no testimony whatever is adduced to show whether, in paying the small floating debt, Buchanan used part of the original $2,000 or part of the proceeds of the manufactured product sold to others. The testimony is clear, too, that sundry creditors were pressing the company, and one even threatening to take out part of the equipment, which surely the plaintiff itself, already a mortgagee, had reasons to see remain. Nor is it to be overlooked that the logs of plaintiff would become involved in laborers' claims in the event of failure, and probably in receivership expenses.

It should, therefore, be proved beyond doubt that Buchanan had no right except to buy, ship to Bradford, resell and remit. Again, suppose him liable, the measure of recovery would not be the whole $2,000, but only plaintiff's loss. The latter admits having received one carload at least out of some logs after the transaction began. All the others say it received much more. If these were from its own logs, the accounting must be different. In *Bell v. Cunningham*, 3 Pet. 69, the gratuitous agent was to invest the proceeds of a shipment in certain commodities. He bought not only these, but others against the protest of the consignor, who, however, did not signify his intention to disavow the transaction entirely. Not only was this last held matter to be considered by a jury under ratification, but it was held the damages must be measured by actual loss after accounting.

In this case no attempt has been made to ascertain that loss. Indeed, the theory of plaintiff seems to have been that the departure from instructions made Buchanan liable at once for the whole. This was quite erroneous. In *Turtin v. Dufief*, 6 Wall. 420, the gratuitous bailee was to lend on good and sufficient security. He took a mortgage but failed to have it recorded, sending it to the principal without drawing his attention to that fact, and the priority was lost by a subsequent incumbrance. The agent was held not liable. And in *Dartnall v. Howard*, 4 B. & C. 345, 10 E. C. L. 351, where he was to invest money in an annuity, he was held not liable though the investment was on an insufficient and somewhat valueless security, for his negligence was not shown to have been gross. The degrees of distinction involved in this class of cases is well set forth in *Preston v. Prather*, 137 U. S. 604.

These doctrines and authorities are not discussed in the arguments before us, and the lower court also, it is manifest, was not assisted toward the real principles and liability here involved.

The cause is remanded for further proof to be added to that already taken, and for further proceedings not inconsistent with this opinion. Costs of this court to abide the event.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13368. Department Two. June 16, 1916.]

ELIZABETH QUINN, *Respondent*, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Appellant*.[1]

INSURANCE—AVOIDANCE OF POLICY FOR MISREPRESENTATION. A legal presumption of implied deceit arises, within 3 Rem. & Bal. Code, § 6059-34, providing that no misrepresentation or warranty made in the negotiation of a contract or policy of insurance shall be deemed material or defeat the policy, unless it is made "with intent to deceive," where an applicant for a life insurance policy, as an inducement to its issuance, stated in his application that he had had no disease since childhood, that he was in good health, and had not consulted a physician in the last five years, when in fact he was suffering from syphilis, and had received medical treatment therefor from a physician less than a month prior to the date of his application for a policy.

INSURANCE — ESTOPPEL TO AVOID POLICY — KNOWLEDGE OF AGENT. Where, previous to taking out a policy of life insurance, the applicant told the authorized agent of the insurance company that he was afflicted with some ailment, for which he had been treated by a doctor, but the nature of which was not disclosed, to which the agent replied that the applicant did not appear to have anything the matter with him, the agent was without such knowledge of the exact nature or condition of the applicant's health as was sufficient to impute knowledge to the company, estopping it from questioning the validity of the policy.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered December 13, 1915, upon findings in favor of the plaintiff, in an action upon a life insurance policy, tried to the court. Reversed.

[1]Reported in 158 Pac. 82.

Hughes, McMicken, Dovell & Ramsey, for appellant.

H. E. Donohoe and *C. D. Cunningham*, for respondent.

HOLCOMB, J.—Respondent, the mother of the insured and the beneficiary named in a life insurance policy for $1,000 upon the life of Joseph L. Quinn, issued by appellant on April 19, 1914, recovered thereon in the court below. The death of the insured occurred on May 23, 1914. Due proof of loss was made by respondent, demand made for payment, and payment refused. The material issues to be decided upon this appeal arise upon the affirmative defense pleaded by appellant, which sets out the application made by the insured for the policy, the issuance of the policy, and the incorporating and making of the application therefor a part of the policy, a copy of which policy and the application therefor is attached to the affirmative answer.

The application begins as follows:

"This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy. I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired."

Statements to medical examiner embraced the following questions and answers:

"17. What illnesses, diseases, injuries or surgical operations have you had since childhood? Ans. None.

"18. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years. Ans. None.

"19. Have you stated in answer to question 17 all illnesses, diseases, injuries or surgical operations which you have had since childhood? Ans. Yes.

"20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years and dates of consultations? Ans. Yes.

"21. (a) Are you in good health? Ans. Yes.

"(b) If not, what is the impairment? Ans. None."

Following the questions and answers is this certificate:

"I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the medical examiner. Joseph L. Quinn.

"Signature in full of person examined."

The affirmative defense sets out the foregoing facts, quoting the questions and answers above, and alleging that each and all of same are wholly false and were known at the time by the applicant to be false, in that the applicant was at that time afflicted with the disease of syphilis, and in that the applicant had shortly prior thereto consulted with Dr. A. J. McIntyre and had been treated by him for that disease. It is admitted by the reply of respondent that, at the time of making his application, the applicant was suffering with a venereal disease, and averred that the defendant had full knowledge thereof. The case was tried to the court without a jury, who made findings of fact in favor of respondent. We, therefore, try the case *de novo*, and must affirm the findings of the court unless the evidence preponderates against the same.

It appears from the evidence that one R. W. Edgington was the duly authorized agent of the appellant and on several occasions solicited the applicant to take out a policy of life insurance; that, previous to the taking out of this policy, the applicant had told the agent that he was afflicted with some ailment the nature of which was not disclosed to the agent, and had been treated therefor by a doctor in Hoquiam; that the agent replied that the applicant did not appear to him to have anything the matter with him; that he, the agent, would see the company's medical examiner in Hoquiam, Dr. Watkins, and that a few days thereafter the

agent returned and said that he had seen Dr. Watkins and that it would be all right. The applicant thereupon made application for the policy on April 15, 1914, and on April 19, 1914, was examined by the appellant's medical examiner, Dr. Watkins, and the foregoing answers were signed.

The testimony of the medical examiner was that Edgington, the agent, had told him nothing whatever concerning the applicant or concerning any disease that the applicant may have been suffering with; that the answers made by the applicant were truly and correctly recorded in the written report of examination made by Dr. Watkins, and that he relied upon them and upon no other information whatever. This testimony of the medical examiner was undisputed. The court found that,

"If the answers of Joseph L. Quinn reported to have been made to Dr. Watkins as aforesaid were actually made by him, they were not made with the intention of defrauding, deceiving, or misleading Dr. Watkins or the defendant company."

The court further found that, previous to the time that Quinn was examined by Dr. Watkins, he had been treated by one Dr. McIntyre who had prescribed for him a treatment of neo salvarsan, on March 16, 1914, and another administration of the same drug on March 18, 1914, and that Dr. McIntyre was of the opinion that Quinn was suffering with syphilis and that he treated him for that disease at the times mentioned. It appears, also, from the testimony of appellant's medical referee and its manager for the territory where this policy was issued, that, had the appellant answered truthfully the questions propounded to him and had the medical report shown that he had suffered with the disease of syphilis within two months prior to the application, he would not have been accepted as an insurance risk and the policy would not have been issued.

There is a statutory provision in the insurance code of 1911, Laws 1911, p. 197, § 34, as follows:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive." 3 Rem. & Bal. Code, § 6059-34.

In view of this statute, the only fact to be determined is whether or not the representations made by the applicant were made, as the court found, without intent to deceive.

When one has made a false representation, knowing it to be false, the law infers that he did so with the intention to deceive. *Hammat v. Emerson*, 27 Me. 308, 46 Am. Dec. 598; *Northwestern Life Ins. Co. v. Montgomery*, 116 Ga. 799, 43 S. E. 79; *Boddy v. Henry*, 126 Iowa 31, 101 N. W. 447; *Thorner v. John Hancock Mut. Life Ins. Co.*, 164 App. Div. 34, 149 N. Y. Supp. 345. Respondent contends, however, that the knowledge of the agent must be imputed to the company, and relies especially upon the case of *Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486. In that case we said:

"Passing to a consideration of the third contention, it suffices to say that this court has steadfastly held that a policy will not be held void, nor will a warranty clause in a policy be held to have been breached, for a cause known to the agent before the application for the policy was signed, where the insured fully and truthfully related the facts to the solicitor, and false answers were written in the application by him [the agent]. . . . The underlying principle of these cases is that the knowledge of the agent is the knowledge of the principal, without regard to whether the agent communicates the facts to it; that where the insured makes full and truthful statements to the agent who procures the policy of insurance, the insurer will be held to have waived the written warranties in so far as they are not in harmony with the facts disclosed, and that this court will determine the authority of the agent from the actual relations of the parties, rather than from the fictitious relations sought to be created by the recitals in the written instruments."

As we view it, however, that case is not applicable for the reason that here the insured did not "fully and truthfully" relate the facts to the solicitor and false answers were not written in the application by the agent. The only evidence there is as to what representations were made by the applicant to the agent is the testimony of an associate of the applicant, as follows:

(Witness Brinn): "Mr. Edgington came to camp several days trying to get us to take out policies. I did not care to take it out and so Joe was not particular. He asked Joe to take it out and Joe told him he did not care to take out a policy because, he put it in this way, he says, 'I have got all the policies I can tend to,' speaking in a joshing way. He says, 'Why, there is nothing wrong with you, is there, Joe?' I spoke up, I says, 'Joe got touched up a little bit.' Then Mr. Edgington asked what was wrong. I said Joe was doctoring in Hoquiam taking treatments for a disease, I did not mention what it was because I did not know. And Mr. Edgington says to Joe, 'You do not look like a sick man to me, better take one out anyway.' And it run on for several days, about a week or so, and finally Mr. Edgington says, 'I shall go down for a talk with Mr. Watkins about this, and he went away for two or three days and came back and says, 'Joe, I think that will be all right. I have been talking with Watkins about it,' Mr. Edgington says to Joe. And Joe then didn't want to take out a policy. And finally Edgington talked to me on writing a policy. I says, 'Joe, we might as well take this, it will be a thousand dollars at the end of twenty years that you wouldn't have otherwise. . . . So he, Joe, says, 'Well, I shall take the policy,' and Mr. Edgington written it out for him. I guess that is all."

This certainly fails to show that the applicant or any one speaking for him had in any way fully and truthfully brought to the soliciting agent of the company knowledge of the concealed facts, brought out afterward, that he was at the time afflicted with syphilis and was taking treatment for it, which he concealed from the soliciting agent as well as from the examining physician.

These facts, with the legal presumption of implied deceit from the falsity of material and inducing representations, clearly overbalanced the finding of his Honor that the assured "had no intent to deceive." These untruthful representations were material, being made as stated in the application "as an inducement to issue the proposed policy." Nor can it be justly said, as counsel for respondent urge, that Quinn may have considered himself cured of syphilis, for it is undisputed that had he disclosed the fact of the existence of that disease within two months previous to his application and treatment therefor, insurance would have been refused him. From the facts that he died only a little more than a month after his application and that his death was due, in the opinion of physicians, either to the disease or to the neo salvarsan treatment, it cannot be doubted that he himself must have known of the seriousness of the disease and that he was probably not cured.

These facts also distinguish this case from the former case from this court, *Turner v. American Casualty Co.*, cited by respondent, and from *Levie v. Metropolitan Life Ins. Co.*, 163 Mass. 117, 39 N. E. 792, and other similar cases. In the *Levie* case, the court say:

"Nevertheless our statute provision . . . precludes the defendant from prevailing, unless it is established not only that the statements or answers were incorrect, but also either that the misrepresentations were made with actual intent to deceive, or that the matter misrepresented increased the risk of loss. . . . Whether the statements and answers of the application were incorrect, and whether, if they were incorrect, the misrepresentations were made with actual intent to deceive, . . . were all questions of fact, to be submitted, if there was a conflict of evidence, to the jury with proper instructions."

As will readily be seen in the present case, it cannot be doubted that the misrepresentations were knowingly made and were therefore impliedly deceitful. They were material and must have been made with intent to deceive. There was

no conflict in the evidence upon those questions, and therefore the case is not parallel to the case cited.

In *Johnson v. Northern Life Ins. Co.*, 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915 A. 458, also cited by respondent, the court say:

"As we construe the statute a material misrepresentation, made with intent to deceive and defraud, avoids the policy. A material misrepresentation, not made with intent to deceive or defraud, does not avoid the policy. . . . Whether a misrepresentation is material, . . . and whether a misrepresentation is made with intent to deceive and defraud, are questions usually for the jury, with the burden of proof upon the insurer."

In *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa 203, 94 N. W. 568, the supreme court of Iowa, having before it almost an identical statute and parallel misrepresentations, say:

"To establish its defense [fraud in procuring an insurance policy], it was incumbent on the defendant to prove not simply that the answers of the applicant were untrue, but that he knew them to be untrue, and thereby obtained the insurance. It is argued that, if the answers are found to be untrue, there is a presumption that the applicant knew it and intended to deceive. This, we think, is not the law. . . . there is no presumption of an intention to deceive from the mere fact that a statement made is not true; such presumption arising only when it appears that the statement is made with knowledge of its falsity."

Again, in this case it is apparent that the case cited is not parallel for the reason that, as we have heretofore said, the facts preponderate to the effect that the statements were untrue, that the applicant knew them to be untrue, and that the presumption is that he intended to deceive when making such untrue representations.

Respondent insists, also, that the judgment should be affirmed for the reason that appellant is estopped to question the validity of the policy from the fact that it was delivered

by the agent of the appellant to the insured at a time when the condition of the health of the insured was as shown by the appellant at the trial, citing *Northwest Life Ass'n v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695. In that case the court say:

"It was about six weeks from the time the policy was delivered until the death of the insured. Appellant held the premium during that time, and knew, through its agent Barnes, the condition of the health of the insured, but did not repudiate his act in delivering the policy or take any steps to revoke or cancel the policy. The knowledge of Barnes concerning the health of the insured should be imputed to his principal, and its failure to act amounted to a ratification of the delivery."

Upon this point, also, we cannot agree with counsel for respondent for the reason that there is no showing in this case that appellant had any knowledge of the condition of the assured's health at the time the policy was delivered to him unless what is contended to be the knowledge of appellant's soliciting agent is imputed to it. But, as we have said before, the soliciting agent had no knowledge, so far as the evidence goes, of the exact nature or condition of the assured's health. Appellant manifestly could not repudiate the act of the agent when he had no knowledge from any statements of the insured of the existence of the disease previous to the time that the policy was delivered.

We are unable to escape the conclusion that the insured misrepresented the facts to the agent of the appellant and especially to the examining physician; that there was no collusion between the examining physician, agent, and insured; that the misrepresentations were material; that they were in fact warranties, and that they materially contributed to the loss.

The judgment is, therefore, reversed and the cause dismissed.

MORRIS, C. J., PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 13387. Department One. June 16, 1916.]

JAMES ALEXANDER *et al.*, *Respondents*, v. CYRUS A. MENTZER, *Appellant*.[1]

JURY—RIGHT TO JURY TRIAL—WAIVER. A demand for a jury trial was waived, where defendant subsequently advised the court that he was willing to proceed without a jury.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 10, 1915, upon findings in favor of the plaintiffs, in an action to foreclose a lien, tried to the court. Affirmed.

J. W. A. Nichols, for appellant.

S. F. McAnally, for respondents.

PER CURIAM.—This is an appeal from a money judgment entered against appellant. The case, in its inception, was a suit for the foreclosure of a lien. When the case was called for trial, appellant made objection that the action was one at law and demanded a jury trial. This, the court and counsel agreed to, provided appellant would pay the jury fee required by law. There was some discussion as to whether the verdict would be controlling or only advisory. After some consultation with appellant, counsel advised the court that they were willing to proceed; that they "might as well go ahead and try it now as any other time." The case proceeded and was finally decided as an action for money. Granting that the application was seasonably made, we think appellant clearly waived his right to a trial by jury.

All other questions in the case depend upon the sufficiency of the testimony to sustain the findings. We have read the abstract prepared by the appellant as well as the abstract prepared by the respondent, and we conclude that the findings are amply sustained by the evidence.

Affirmed.

[1]Reported in 158 Pac. 75.

[No. 13455. Department Two. June 16, 1916.]

GEORGE VAUGHAN *et al.*, *Respondents*, v. L. R. FIFER, *Appellant*.[1]

LOGS AND LOGGING—LABOR LIENS—LUMBER "AT THE MILL." Lumber manufactured from saw logs was still "at the mill," within the terms of Rem. & Bal. Code, § 1163, entitling laborers thereon to liens, though piled on land close to the mill leased to the purchaser, where by the provisions of his contract, the sale was to be "f. o. b. the mill," evidenced by a bill of sale, the lumber was to be surfaced by the manufacturer and loaded by it in amounts as the purchaser might designate, and final payments to be made upon receipt of invoice and bills of lading issued therefor, none of which acts had taken place prior to the filing of liens.

LOGS AND LOGGING—LABOR LIENS. The right to labor liens on manufactured lumber, under Rem. & Bal. Code, § 1163, would not be lost by reason of the fact that title had passed to a purchaser, where the lumber was still physically "at the mill," and further duties were to be performed by the manufacturer incident to its sale.

LOGS AND LOGGING—LABOR LIENS. Under Rem. & Bal. Code, § 1175, authorizing laborer's liens upon the whole or any part of manufactured lumber, a purchaser of lumber subject to lien is not entitled to a *pro tanto* reduction of the claims against his lumber from the fact that a considerable portion of the claims could have been satisfied out of other lumber disposed of in bankruptcy proceedings against the manufacturer.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 2, 1916, upon findings in favor of the plaintiffs, in an action to foreclose liens, tried to the court. Affirmed.

Walter Metzenbaum and *S. H. Kelleran*, for appellant.

Albers & Allen, for respondents.

PARKER, J.—The plaintiffs, Vaughan and forty-one others, commenced this action in the superior court for Lewis county seeking foreclosure of liens claimed by them upon certain lumber which by their labor they assisted in manufacturing

[1]Reported in 158 Pac. 93.

while employed by the Baker-May Lumber Company, at its mill at Mays, in Lewis county. The defendant Fifer, doing business as L. R. Fifer Lumber Company, was made a party to the action because of his claim of title to the lumber sought to be foreclosed upon, and because of his claim that the lumber was removed from the mill where manufactured before filing of the plaintiffs' several claims of lien in the office of the auditor of Lewis county. The trial of the case in the superior court resulted in decree of foreclosure in the plaintiffs' favor, from which the defendant has appealed to this court.

That the respondents by their labor assisted in manufacturing the lumber in question while employed by the Baker-May Lumber Company at its mill seems not to be questioned here. Nor is the sufficiency of their claims of lien filed in the office of the auditor of Lewis county questioned as to their form or substance. Each of respondents claims under the provisions of Rem. & Bal. Code, § 1163, reading as follows:

"Every person performing work or labor or assisting in manufacturing saw-logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, . . ."

Appellant rests his title to the lumber as against the claims of respondents upon the following contract and the alleged removal of the lumber from the mill in pursuance thereof:

"This agreement, entered into by and between L. R. Fifer, sole trader. doing business as L. R. Fifer Lumber Co., party of the first part, and Baker-May Lumber Co., a corporation, party of the second part, this 7th day of April, 1915.

"Witnesseth, that the party of the first part contracts to purchase from the party of the second part and the party of the second part contracts to sell to the party of the first part, one million two hundred thousand feet dimension No. 1 common lumber, 2x4 to 2x12, 12 to 24 feet in length, at

$6.50, *F. O. B. the mill* of the party of the second part, the same being located at Mays, Washington.

"It is agreed that the width and lengths of said lumber shall be as follows: . . .

"It is agreed that the party of the second part will furnish the same at not less than 150 M. a month and pile the same on Lateral No. 1, SE.¼ of SE.¼ of Sec. 4, Twp. 13 N. Range 4, and mark the piles forthwith, 'Property of L. R. Fifer Lumber Co.,' and *execute a bill of sale for the said lumber as soon as cut*, and the party of the second part agrees *to surface the said lumber and load the same upon the demand of the party of the first part in amounts as designated by the party of the first part*, without any other charge whatsoever.

"It is understood and agreed between the parties hereto that title to the said lumber vests in the party of the first part as soon as the same is piled in the piles as designated heretofore.

"That the party of the first part advances to the party of the second, $3,000, receipt of which is acknowledged by the party of the second part, the same to apply on the lumber manufactured under this contract by the party of the second part and it is specifically understood that the said $3,000 shall apply upon the first lumber manufactured, by the party of the second part to an amount aggregating $3,000 in value. It is agreed that after the said $3,000 is consumed in the payment of lumber so cut the party of the first part will purchase the remainder of said lumber as follows: $4.00 per M. when the lumber is piled as designated heretofore, and the balance of $2.50 per M. is *to be paid upon the receipt of invoice and bills of lading*, . . .

"That the party of the second part further contracts, with his wife, to mortgage to L. R. Fifer an undivided one-half interest in the following described real estate, SE.¼ of Section 14, Twp. 23, Range 6 West, Douglas County, Oregon, the *said mortgage being intended to secure the party of the first part from any loss or damage that may occur from liens upon the said lumber* or any failure to cut the lumber of the grade, quality, or dimensions as designated by the party of the second part, or for any other damage that may arise because of the breach of this contract on the part of the party of the second part. In the event that the party

of the second part is compelled to sue, any recovery he may obtain by reason of such a suit shall carry with it an attorney's fee of $100 in favor of the party of the second part."

We have italicized the portions of this contract to which we will presently call particular attention. A few days prior to the signing of this contract, the mill company leased to appellant the lateral mentioned in the contract on which the lumber was to be piled as manufactured. This was the lateral of the lumber company closest to its mill, it having other laterals on which it piled its lumber as manufactured farther away from the mill, and was unquestionably "at the mill" within the meaning of those words as used in Rem. & Bal. Code, § 1163 (P. C. 309 § 15), above quoted, unless the piling of lumber thereon is to be considered a removal of it from the mill because of the lease of this lateral to appellant. The lumber in question was manufactured between April 12, and May 25, 1915, on which latter date the mill ceased to operate because of the insolvency of the company and its passing into the hands of a receiver appointed by the Federal court. As the lumber in question was manufactured, it was piled on the leased lateral, and as each pile was completed, there was plainly stencilled thereon the words "property of L. R. Fifer Lumber Co." At the time the mill ceased to operate, there was piled and stencilled on the leased lateral some 228,000 feet of lumber. This lumber, it seems, is substantially all of the lumber at or near the mill now available to satisfy respondents' liens, though there was other lumber at the mill which we may assume was subject to their liens but which lumber has since been disposed of in the bankruptcy proceedings. No bill of sale was executed by the lumber company to appellant as provided in the contract. It is not claimed that appellant has ever demanded that the lumber be loaded upon cars nor that it be surfaced, nor has appellant waived these required duties of the lumber company, which are yet to be performed incident to the

sale of the lumber by the lumber company according to the terms of the contract.

The principal contention of counsel for appellant is that this lumber has been removed and was not "at the mill" nor "under the control of" the lumber company at the time respondents filed their liens, within the meaning of Rem. & Bal. Code, § 1163, above quoted. Counsel for appellant call our attention to and rely particularly upon three decisions of this court which we will now notice.

In *Swartwood v. Red Star Shingle Co.*, 13 Wash. 349, 43 Pac. 21, liens of laborers assisting in the production of shingles was involved. The court there found that the shingle company had sold the shingles upon which the plaintiffs were attempting to enforce their liens. The defendant, purchaser from the shingle company, took possession of the shingles, removed them from the mill where manufactured to a shipping warehouse on the railroad about a quarter of a mile from the mill, the shingle company having executed and delivered to the defendant a bill of sale for the shingles, which was duly recorded. There was nothing whatever left for the shingle company to do incident to the sale. Upon these facts, it was held that the shingles were no longer "at the mill" nor "under the control of the manufacturer" and hence no longer subject to labor liens.

In *Judge v. Bay Mill Co.*, 18 Wash. 269, 51 Pac. 378, which is the case most strongly relied upon by appellant, the contract of sale to the defendant purchaser called for delivery of shingles on board a car which was placed upon the railway company's switch near the mill and the mill company loaded the shingles thereon, when the car was closed and sealed and the railway company issued to the defendant purchaser a bill of lading in usual form by the terms of which the railway company was to transport the shingles to the state of Missouri. The car so loaded was left a short time on the switch very close to the mill where the shingles were

manufactured, and so far as its mere physical location was concerned, it might be said that it was "at the mill." It was held, however, that, in view of the mill company having loaded the car, caused it to be closed and sealed, and a bill of lading having been issued to the purchaser of the shingles by the railway company, they were in law no longer "at the mill" nor "under the control of the manufacturer." Here again we have a case where the sale was completed and every act incident thereto required of the mill company was performed.

In *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51, we have a situation not materially different from that involved in the *Judge* case. It was, however, manifestly less favorable to appellant's contention, in that the lumber involved was delivered to the railway company some distance from the mill.

We are constrained to hold that these decisions are not controlling here, in view of the facts of this case. We have seen that, by the terms of the contract relied upon by appellant, his purchase of the lumber was to be evidenced by "bill of sale for said lumber as soon as cut"; the contemplated sale was to be "F. O. B. the mill"; the lumber was to be not only loaded but also surfaced by the lumber company upon demand of appellant in amounts as designated by him; appellant was to receive a mortgage to secure him from "damages that may accrue from liens upon said lumber," and evidently the final invoice and bills of lading to be issued upon the loading of the lumber for shipment were to be the final acts to be performed by the lumber company. These duties to be performed by the lumber company under the contract, not being performed and not being waived by appellant, lead to the conclusion that the sale and delivery of the lumber had not been perfected to that extent that it became removed from the mill in law, so as to prevent the liens of laborers assisting in its manufacture attaching to it.

We have not lost sight of the provision of the contract which declares that the title to the lumber vests in appellant

as soon as the same is piled and stencilled. Recurring to § 1163, however, we find that the mere passing of title as between the mill company and appellant is not necessarily a controlling fact as to respondents' lien rights. The fact remains that this lumber was still physically at the mill, even nearer to the mill than the lumber company's own lumber and that the mill company had further duties to perform incident to the sale of the lumber. In other words, the contract was still executory notwithstanding, as between the lumber company and appellant, the title to the lumber may be regarded as having passed upon its piling upon the leased lateral.

We are of the opinion that, under all the facts shown, the lumber in question was, at the time of the filing of respondents' claims of lien, "at the mill" within the meaning of those words as used in Rem. & Bal. Code, § 1163, above quoted, and that therefore respondents' lien rights attached thereto.

Some contention is made in appellant's behalf that the lien claims of respondents should in any event be reduced in amount because, as counsel claims, a considerable portion of the amounts due respondents could have been satisfied out of other lumber at the mill, which other lumber seems to have been disposed of in the bankruptcy proceedings. This contention, we think, is fully answered by the provision of Rem. & Bal. Code, § 1175, reading as follows:

"Any person who shall bring a civil action to enforce the lien herein provided for, or any person having a lien as herein provided for, who shall be made a party to any civil action, has the right to demand that such lien be enforced against the whole or any part of the saw-logs, spars, piles or other timber or manufactured lumber or shingles upon which he has performed labor . . ."

See, also, *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415, 97 Pac. 297. It seems quite plain to us that the whole of respondents' lien claims may be enforced against this lum-

ber, though they may have possibly been enforcible against other lumber.

We conclude that the trial court correctly disposed of the rights of the parties and that its judgment and decree must be affirmed. It is so ordered.

MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13466. Department Two. June 16, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY ROBERTS, *Appellant*.[1]

CRIMINAL LAW — TRIAL — CONDUCT OF JUDGE — COMMENT ON EVIDENCE. Where a witness for the defendant in a criminal prosecution, by means of a proper cross-examination by the prosecutor, had already been discredited for perjury in her testimony on a former trial relating to the same state of facts, the action of the court in further examining the witness to ascertain whether she was certain as to the nature of the testimony previously given and as to the nature and effect of her testimony in the pending trial would not constitute a comment on the evidence within the prohibition of Const., art. 4, § 16.

CRIMINAL LAW—TRIAL—ARREST OF WITNESS FOR PERJURY. Where a witness admitted the falsity of her testimony on a former trial involving the same state of facts under examination in a pending trial, the conduct of the court in having such witness held to answer for a charge of perjury, during the absence of the jury from the court room, would not constitute prejudicial error.

PROSTITUTION—PUNISHMENT—EXCESSIVENESS. A sentence of four year's confinement in the state reformatory against a man convicted of receiving compensation for causing a female to cohabit with others than her husband is not so unreasonable as to show abuse of the court's discretion.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 30, 1915, upon a trial and conviction of a statutory offense, after a trial on the merits. Affirmed.

[1]Reported in 158 Pac. 101.

C. E. Collier, for appellant.

Geo. F. Yantis, for respondent.

HOLCOMB, J.—Appellant was informed against and convicted of having received compensation for causing a female to cohabit with male persons other than her husband. The date fixed in the information is on or about January 25, 1915. On trial, the state elected to rely upon an offense of date April 10, 1915, and directed all its evidence to that date as to the particular act relied upon for conviction. The case as made by the state was substantially as follows: Henrietta Cairns, the female in question, testified that she and appellant had been acquainted for some time prior to April 10, 1915, she being of the age of about sixteen years; that, about the first of the year 1915, appellant induced her to engage in acts of sexual intercourse with various Chinese, and continued to ply her in such course during the winter and a portion of the spring of 1915, taking her at various times from her home to Chinatown, to the Mitchell hotel, the Columbia hotel, the Tacoma hotel, a Chinese laundry, and the dwelling house occupied by an Austrian fisherman, all in Olympia, Thurston county, for the purpose of meeting the Chinese, appellant compelling witness to such course of conduct by his representations that he was an officer of the law, and by threats of personal violence and exposure and commitment to a reformatory institution. She further testified that, for each of the acts of intercourse, the sum of $2.50 was paid, either directly to appellant or into her hands, to be taken from her later by appellant. On the afternoon of April 10, 1915, she met appellant, accompanied him to her home in the early evening, later returned with him to the downtown portion of Olympia, going to the place referred to as the Austrian shack where she met Chinese, and in front of which place she met the Chinaman Charley Kay whom, together with Roberts, she accompanied to the Mitchell hotel for the act of intercourse relied on for conviction and alleged

to have taken place at eleven o'clock p. m.; that from there she went with appellant to the Tacoma hotel where she engaged in intercourse with other Chinese and a Japanese; that she occupied room 17 of the Tacoma hotel on the night of April 10, after about eleven o'clock, with Roberts, and the next morning or near noon of the next day, she was taken to her home in a jitney bus by one Hazel Hyatt. She fixed the date of April 10 by the fact that she purchased a dress on that date, being the first dress purchased by herself and being charged to her at a local drygoods store on that date. Her father and mother corroborate her testimony that, on that particular date, also fixed by the date of the entry of the purchase of the dress, the witness came to her home early in the evening with appellant, returned with him to the city in the evening after promising to return early to her home, spent the entire night away from home, and returned in a jitney bus about noon on Sunday, the following day. Both parents testified that appellant represented to them that he was an officer of the law. The clerk of the Tacoma hotel testified that appellant engaged room 17 on the afternoon of April 10, as shown by the hotel register. The Chinaman Kay testified to the act of intercourse, and further that he met the girl near the Austrian's shack. Another witness testified to having seen the girl and appellant at or near the back entrance to the Tacoma hotel, apparently going to the back entrance, at about eleven o'clock on some night not definitely fixed in the spring of 1915. This witness also testified that, at about the same time, he saw appellant going toward the back entrance of the same hotel with one whom he took to be a Chinaman.

Appellant did not take the stand in person, but relied on the testimony of one Jean Brownlee to testify to having occupied room 17 at the Tacoma hotel, being the room complaining witness claimed to have occupied on the night of April 10, and on that particular night spending the evening in the company of appellant, and to deny that the girl in

question was in that room on that night. On cross-examination by the prosecutor, it developed that she had testified to the identical facts in a similar case against appellant as to the same room, which case had been tried shortly before the trial of the present case, and had fixed her date by alleging circumstances which she admitted on cross-examination were false. On cross-examination by the prosecutor, this witness testified, that she fixed April 10 as the date on which she came to Olympia by its being on Saturday night and the first week after she had gone to Tacoma where she was looking for work; that she had no employment; that she went back on Sunday morning to pursue her search for work; that she had testified in a case "last week" in which the state was plaintiff and Henry Roberts was defendant in the same court; that she testified in that trial that on April 10, 1915, she was employed by the Lyceum theater in Tacoma; that she went to work there on the Saturday preceding Easter Sunday; that there could be no mistake as to the time in which she was employed; that she had, after testifying in that case, sent a telegram to a person in Tacoma asking that person to verify her statement; that the telegram was to the proprietor of the Lyceum theater; that, as a matter of fact, she had left that place (the Lyceum theater) long prior to the 10th of April; that she found she had been mistaken. Other misstatements of hers while testifying in the previous trial were elicited by the cross-examination of the prosecutor.

The court interrupted the cross-examination by the prosecutor, the following occurring:

"By the Court: May I ask this witness just a few questions and if on the part of either party there is any objection to the questions, you will call it to my attention Mr. Yantis or Mr. Collier. Q. You remember testifying in a cause in court last week against this defendant, do you? A. Yes, sir. Q. Do you remember in the trial of that cause that you were questioned with reference to your occupancy of room 17 in the Tacoma hotel of this city? A. Yes. Q.

And that you answered that you occupied that room that night? A. I did. Q. With reference to your being certain as to the date you testified that it was on the Saturday following Easter? A. Yes. Q. Do you remember if you stated that you were quite sure of the date because you commenced work with the Lyceum theater in Tacoma on or about the third of April and that the 10th was the second Sunday after you had commenced work with the Lyceum theater in Tacoma that you came down here? A. I believe that was one reason I gave for the date. Q. Do you remember if in that examination you were questioned—cross-examined, and that from time to time you stated to the jury which was hearing that cause that there was no question but that it was during the month of April that you worked at the Lyceum theater? A. Yes, sir. Q. Had you at the time that you gave that testimony here in court last week undertaken to verify the facts that you were at work at the Lyceum theater April 3d to April 10? A. No, sir, not at the time I testified. Q. You simply depended on your remembrance? A. Yes, sir. Q. And you now say that that is true, that is, that you did work there during that time? A. No, sir, I found that I was mistaken. Q. And to what extent? A. That it was in October that I had worked there instead of April. Q. In October last year? A. Yes, sir. Q. How have you found that out since you testified last week, from October last year until April of this year? A. By inquiring. Q. Yes. Is it not true that in testifying last week that you said that you knew it was April 10th that you came down here and left the Lyceum theater because it was Saturday after the Easter of this year? A. Yes, sir."

After the foregoing examination by the court, this witness was examined in redirect by counsel for appellant and further cross-examined by the prosecutor, and her testimony as to the inconsistency of her former testimony and the untruthfulness of her testimony was further confirmed. At the conclusion of the further cross-examination by the prosecutor, the court announced, "The jury may be excused at this time for ten minutes." After the jury had retired, the court announced that he would submit to the prosecuting

attorney whether or not an information charging perjury should be filed against witness Brownlee, which was thereupon done by the prosecuting attorney, and witness was placed in the care of the sheriff, after which the jury was recalled.

Appellant contends that the court erred in that he commented upon the evidence of the appellant's witness Brownlee in violation of the rights of the appellant under art. 4, § 16, of the state constitution, by conducting a rigid and extended cross-examination of said witness in the presence of the jury during the progress of the trial, which constituted comment prejudicial and detrimental to the rights of appellant. Appellant relies upon *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; 40 Cyc. 2440; *State v. De Pasquale*, 39 Wash. 260, 81 Pac. 689, and *State v. Jackson*, 83 Wash. 514, 145 Pac. 470.

The rule stated from 40 Cyc. 2440, is as follows:

"In a criminal case the action of the trial judge in subjecting the witnesses of defendant to a rigid and extended examination on the vital points of the defense, or in catechising them at length as to their knowledge of the facts as to which they have testified, has a tendency to discredit them and is prejudicial error requiring a new trial in case of conviction."

In the *Crotts* and the *De Pasquale* cases, the circumstances were very similar. In both cases, important witnesses for the defendant were testifying and were cross-examined by the court in a way which plainly showed that the court discredited the testimony of the witnesses, and in neither of the cases had the witnesses in any way discredited themselves. In the *Jackson* case, relied upon, there had been no occasion to question the witness' credibility until the court intervened and by his line of questions plainly indicated a doubt as to the credibility of the witness' testimony, and thus presented the testimony of the witness to the jury in an unfavorable light. There could be no doubt in any of the cases

cited that the conduct of the court constituted comment upon the testimony of the witnesses in each case unfavorable and prejudicial to the party calling the witnesses, and was undoubtedly in violation of the constitutional provision that the court shall not comment upon the evidence otherwise than by his charge to the jury and then not in any such way as to indicate the belief of the court as to the nature of the testimony or its credibility. The matter complained of in this case, however, does not come within the constitutional prohibition or the rule announced in the cases cited, for the reason that here the witness had already discredited herself by cross-examination properly conducted by the prosecutor, and the conduct of the court in further examining the witness was for the purpose undoubtedly of ascertaining for himself whether the witness was certain as to the nature of the testimony given by her previously and was certain of the nature and effect of the testimony given by her in the present trial, so that no injustice might be done. Having been satisfied upon that question and during the absence of the jury, he presented the matter to the prosecuting attorney as to whether or not the witness should be held for perjury. This, also, was justifiable and, the witness having admitted the falsity of her testimony, the fact that she was placed under arrest for perjury for having given the admittedly false testimony could not in any sense be called prejudicial to the appellant. In other words, only in case there could be any question as to the truth or falsity of the testimony was the appellant entitled to have it go to the jury uninfluenced by any comment or opinion of the court. But where the testimony was admittedly false and the witness discredited thereby, the conduct of the court in having such witness held to answer for a charge of perjury could not in any way prejudice the appellant. All that the appellant was entitled to was a decision of the jury upon conflicting testimony or upon the testimony adduced as a whole, as to its truthfulness, credibility, and reliability, and he was not entitled to have

a perjured witness treated as a reliable witness in order that he might possibly escape.

The evidence as a whole justified the verdict of the jury, and the further contention of appellant that the judgment and sentence imposed by the court of four years' confinement in the Washington State Reformatory at Monroe is unreasonable, we do not consider of any consequence. The trial court in such case was charged with the responsibility of determining the punishment to be inflicted according to the conditions and circumstances of the case and of the accused, and there does not seem to have been any abuse of discretion by his Honor in assessing the punishment.

We find no error. The judgment is affirmed.

MORRIS, C. J., PARKER, BAUSMAN, and MAIN, JJ., concur.

[No. 12912. *En Banc.* June 20, 1916.]

THE CITY OF SEATTLE, *Respondent*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS — EMINENT DOMAIN — APPEAL — RECORD. The superior court having entire jurisdiction of eminent domain proceedings until final judgment, the record on appeal from a judgment therein properly includes proceedings before one of the judges of the court who, subsequent to the judgment, had been disqualified for prejudice and a second trial held before another judge of the same court.

MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENTS—POWER OF COURT TO FIX BOUNDARIES. The superior court has no power, under the statute authorizing eminent domain proceedings by cities, to direct the exact limits of territory that should be included in any assessment district, that being a legislative power delegated to the eminent domain commissioners.

MUNICIPAL CORPORATIONS—ASSESSMENT OF BENEFITS — ARBITRARY ASSESSMENT. The action of the eminent domain commissioners in assessing the total cost for the appropriation of land for street pur-

[1]Reported in 158 Pac. 252.

poses against the remainder of the tract through which the street was opened was arbitrary, where the object was to extend an existing street in a settled district through the tract, so as to connect with a paved boulevard which was of some special benefit to the property owners of the district whose street was thus extended.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 9, 1915, confirming an assessment roll in eminent domain proceedings by a city, after a trial on the merits to the court. Reversed.

James B. Howe and *Hugh A. Tait*, for appellants.

Hugh M. Caldwell, *Walter F. Meier*, *James E. Bradford*, and *W. D. Covington*, for respondent City of Seattle.

Wright & Huntoon, for respondent Rank *et al.*

HOLCOMB, J.—The respondent city condemned a strip of land through the property of the Puget Sound Traction, Light & Power Company (which for brevity we shall call the Traction Company), 54 feet wide and about 1,200 feet long, extending from Woodland Park avenue to the intersection of Green Lake boulevard and Ashworth avenue. The strip was to constitute an extension of North Seventy-seventh street. A jury in the condemnation proceeding found the value of the land appropriated to be $8,250, for which sum a verdict was awarded. The matter was then referred by the court to the board of eminent domain commissioners of the city, for the purpose of levying assessments upon the property specially benefited by the opening of the street to satisfy the award and the costs of the proceeding. Appellants were the only parties named in the condemnation proceeding. The eminent domain commissioners returned an assessment roll on which an assessment of $8,979.70 for special benefits was levied upon two strips of land, belonging to the Traction Company and incumbered by the other appellants, lying on each side of and adjacent to the condemned strip. The land so assessed is a part of the remainder of a tract of about thirty-five acres of unplatted land from which the

condemned strip is taken, lying on the northwesterly side of Green Lake, which is bounded on the west by Woodland Park avenue, east and south by Green Lake boulevard and Ashworth avenue, and north by North Dayton street. No other land was assessed for benefits. The net result of the proceeding was that appellants were allowed $8,250 as compensation for the land appropriated, which was assessed back to it with an addition of $729.70, the last mentioned sum being the costs of the proceeding, and $538.54 accrued interest on the award.

Appellants objected and excepted to the assessment roll, on the ground that the assessment was arbitrary, inequitable, in excess of benefits to appellants, and based upon a fundamentally wrong basis.

The matter came on for hearing before Smith, J., who, after hearing all the evidence offered by the city and the appellants, directed and adjudged that the assessment against the property of the appellants be reduced by the sum of $2,000, and that such sum be spread upon the real estate to the west of Woodland Park avenue to Dayton street and from the alley next north of Seventy-fifth street to the alley next north of Seventy-eighth street, and that the roll be re-referred to the commissioners to be recast.

An amended roll was thereafter prepared and returned, on which the assessment against the property of appellants first included in the original district was reduced by the sum of $1,700, but some other property of appellants was included which was not included in the original district and assessed at a small sum. The new roll included the real estate directed to be included in the order re-referring the roll.

About ninety-four owners of the property so included in the new roll objected thereto and to the assessment, and filed an affidavit of prejudice against Smith, J., hearing the matter of the amended roll, and it was assigned by the presiding judge to Tallman, J., before whom it was heard.

After hearing the evidence offered by the city, the new parties, and the appellants, Tallman, J., directed the cancellation of the assessments against the new property named in the amended roll, and that the entire amount of the original assessment be levied back upon the two 100-foot strips of the Traction Company. From this judgment, comes this appeal.

Respondent moves that so much of the abstract of record as pertains to the hearing of the original roll and the order thereon before Judge Smith be stricken. This cannot be done. From the institution of the proceedings under the statutes relating thereto, the superior court is given jurisdiction of the entire matter until final judgment. *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121. The superior court of King county is one court although there are nine judges thereof. The proceeding to acquire the land for the extension of the street and to assess the property specially benefited for the cost of the improvement was one proceeding. The statement of facts necessary to be certified on appeal should contain all matters material to the cause not already made a part of the record thereof. It was necessary also to abstract the same. The proceedings before Judge Smith were properly included in the statement of facts and in the abstract. The motion is denied.

We do not think that the court had power under the statute to direct the exact limits of territory that should be included in any assessment district. This is a legislative power.

"The statute expressly enjoins upon the commissioners the duty of apportioning the total cost between the city and the district specially benefited in such proportion as shall be relatively equitable. If, however, they fail to do this, the power of the court to review their action is restricted." *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279.

"In this class of cases, opinions will differ widely as to the proper boundaries for an assessment district, and as to the benefits to accrue to the different properties within the district; but this court cannot substitute its judgment for the judgment of those whom the law has charged with the duty

of establishing the district and apportioning the cost, whenever such difference of opinion may arise." *In re Seattle*, 50 Wash. 402, 97 Pac. 444.

The superior court can review, revise, modify, set aside, or confirm an assessment roll in this sort of proceeding. In so doing the court can assuredly order to be included property arbitrarily omitted from assessment which is manifestly within the area of benefits, and it can order that property which is manifestly and arbitrarily included within the district, which is not and cannot be specially benefited, omitted and excluded therefrom. This is the exercise of the power of the court to "revise, alter, or modify" the assessment. It is not the substitution by the court of an entirely new district or area of benefits. The court may, in refusing to approve and confirm the assessment roll, indicate the judicial reason therefor, that it is apparent that an entire area is either included or excluded unjustly and arbitrarily. To readjust an assessment district very generally and comprehensively, under these statutes, the court must follow the statutes and refer the entire matter back to the eminent domain commissioners, or appoint new commissioners and order the benefits assessed anew.

Judge Smith proceeded from the premise that, "It is neither usual nor fair to confine an assessment district between the termini of the piece that has been condemned. The condemnation was not for the benefit of the tract of the respondent wholly. If that was the intention of it, no doubt the respondent itself would have dedicated the street before this." This premise may not be correct as a general rule, but we think it is certainly correct as applied to the conditions here shown. This case is almost exactly parallel with the case of *Spokane v. Kraft*, 67 Wash. 245, 121 Pac. 830, and *Id.*, 82 Wash. 238, 144 Pac. 286. As was said in *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206:

"Assessment districts must have a point of beginning and a point of termination. The fixing of these extremes often

presents many perplexing questions upon which there would be a never ending variety of opinion. It is, therefore, of the first importance that some definite rule be laid down for the guidance of trial courts. The best rule that has been announced, and the only practicable working rule is that the courts should not change the district established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis."

But in this case we observe that the object of the appropriator was to open a street or public highway so as to extend a street already existing through a platted and settled portion of the city to connect with a paved highway or boulevard, which must of necessity have been of general benefit to the public or the city at large, and must in our judgment have been of some special benefit to the property owners and residents of the district from which this street would be extended to the boulevard. It certainly was arbitrarily determined that the Traction Company through whose land the street was extended was the only owner generally and specially benefited. Of course, this cannot be said in all cases, for there may be exceptions to any rule. But it certainly is so in this case, just as it was so in the case of *Spokane v. Kraft, supra.* It was manifest that the eminent domain commissioners set out to assess back the cost of the appropriation to the remaining land of the condemnee. In the hearing on the amended roll before Judge Tallman, the commissioners, by their simple asseverations and bald conclusions, endeavored to show the correctness of their original assessment and declined to agree to any other basis of assessment. There was testimony before the court in the hearing before Judge Smith, by apparently competent, able, and fair-minded men, such as Ex-Mayor Dilling of Seattle and others, to the effect that the property of the Traction Company could not possibly be benefited to the extent of more than forty or fifty per cent of the cost of the extension. They gave their reasons and deductions, which were very logical and plausible.

Of course, there were apparent differences of opinion between them and the witnesses for respondent. Whether they were honest differences depends upon whether their respective opinions appear to have been well based or ill founded. Judge Smith, however, taking into consideration all the conditions and circumstances and endeavoring to reconcile and harmonize the facts, thought that not more than twenty-five per cent or $2,000 of the cost of the extension, should be spread upon the property of other property owners, and that that should be spread upon property which he determined and lying to the west of the extension. In thus attempting to define the limits of the assessment district, Judge Smith exceeded his authority. And in finding that the Traction Company was benefited to the extent of about seventy-five per cent of the cost of the assessment, while within his authority, he was apparently sufficiently considerate as to other property holders specially benefited, and he was amply sustained by the evidence that the assessment against the appellants' property was fully $2,000 excessive, and arbitrary.

At all events, it seems to us that no argument is necessary to show that the assessment in this case was arbitrary and disproportionate to the benefits realized by the owners of the property taken for street purposes, to the extent of $2,000 at least. *Spokane v. Kraft*, 82 Wash. 238, 144 Pac. 286. See, also, *In re Eighth Avenue Northwest*, 77 Wash. 570, 138 Pac. 10; *In re Ninth Avenue West*, 76 Wash. 401, 136 Pac. 488; *Norwood v. Baker*, 172 U. S. 269.

In general, the power of the courts over such proceedings is revisory under the statute, and if the statute and the constitution were obeyed according to their letter and spirit, and after the manner that has been so often pointed out by this court, the duty and power of the courts would be simple. The courts should not attempt to direct or control the discretion of the legislative officers, but should curb and control their indiscretion. We should not hold in this case that the finding of Judge Smith on the original hearing was *res judicata*.

We can only hold that, until a proper assessment roll is prepared equitably proportioning the cost of the improvement upon all property benefited thereby, assessing the property within a proper assessment area or district, it ought not to be approved. It must be borne in mind that the statute provides for reassessment, and when all these various sections are considered, the costs of a reassessment as well as of the original award and costs, must be laid against the property benefited.

The judgment is reversed, and the cause remanded with instructions to order a reassessment by the eminent domain commissioners, and that the assessment be spread upon all property specially and relatively benefited by the improvement, in accordance with this opinion. Appellants will recover costs.

MORRIS, C. J., PARKER, MOUNT, CHADWICK, and FULLERTON, JJ., concur.

ELLIS, J., concurs in the result.

[No. 13171. *En Banc.* June 20, 1916.]

J. H. LATSHAW *et al.*, *Appellants*, v. WESTERN TOWNSITE COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS—POWERS—TRUSTS. The fact that a land company in the transaction of its authorized business necessarily sustains fiduciary relations to a limited extent toward those dealing with it does not render it amenable to the statutes governing corporations organized to carry on a distinctively "trust" business.

CORPORATIONS—FOREIGN CORPORATIONS—POWER TO DEAL IN REAL ESTATE. Under Rem. & Bal. Code, § 3720, prohibiting foreign corporations "hereafter organized" from exercising the power of dealing in real estate, a foreign corporation organized before the enactment of the statute, but obtaining a certificate enabling it to transact business in the state after the date of the enactment of such section, has power to carry on such business in this state, the issuance of certificate of admission not constituting organization within the meaning of the statute.

CORPORATIONS—FOREIGN CORPORATIONS—ACTS. The acts of a foreign corporation in excess of its powers as to dealing in real estate in contravention of Rem. & Bal. Code, § 3720, can be questioned only in a proper proceeding by the state.

Cross-appeals from a judgment of the superior court for King county, Albertson, J., entered February 25, 1915, upon findings in favor of the defendants, in an action for an accounting, tried to the court. Affirmed.

Fenley Bryan and *Stallcup & Stallcup*, for appellants.

Geo. W. Korte (*F. M. Dudley*, of counsel), for respondent Milwaukee Land Company.

Bogle, Graves, Merritt & Bogle and *A. L. Agatin*, for respondents Beverly Land Company *et al.*

BAUSMAN, J.—Plaintiffs, having as owners platted part of their lands, entered into two contracts with the Western Townsite Company. One provided for a general conveyance to it in consideration of one dollar and of a local station to be erected by the defendant railway company, which was the

[1]Reported in 158 Pac. 248.

owner of all the other company's stock. The townsite company out of these lands was to give the railway company the station site, plat the remainder, make sales with clear title to purchasers and, after deducting expenses with due accounting, equally divide the proceeds between itself and the owners. By the second contract, which related to the previously platted part, the townsite company was to make its new platting conform nearly to the old and give previous purchasers options of new selection. Power to collect sums already due was also bestowed upon the townsite company, which, simultaneously with these contracts, received a deed.

The contracts, made assignable by language which we deem both sufficient and unqualified, were subsequently assigned together with a general transfer of all interest in these lands to the defendant Milwaukee Land Company, and, during a considerable period, many sales were made, much money was remitted, and considerable work was done. The performance was chiefly by the Land Company, but that the plaintiffs acquiesced in its succession is beyond successful dispute.

Sundry differences having arisen, plaintiffs now call the whole transaction void. They sue for an accounting as to what has accrued as well as to get back what is yet to be sold, arguing that they had lodged in the townsite and land companies a trust capacity contrary to our statutes and that the latter company was, besides, a creature unlicensed by local law.

The lower court decreed certain sums in plaintiffs' favor on the accounting but denied them restoration of the lands, title to which it fully confirmed in the defendants and their transferees. Plaintiffs prosecute an appeal with cross-appeal by the land company, against which the accounting was decreed.

In 1903 there was enacted here a statute for the incorporation of trust companies. Before that time our corporations had often accepted simple trusts, such as those for mort-

gage bondholders, but it was universally recognized that there were others—receiverships, guardianships, and administration of decedents' estates, which our statutes had not yet empowered them to discharge. These our corporations had seldom if ever attempted. On the other hand, it had not been decided and has not since been decided that such trusts as they had been exercising were beyond the general corporation statutes. The new enactment was passed simply because it was obviously necessary to authorize in this state the general fiduciary for hire. Nearly all trusts were made possible to subsequent corporations, but as to pre-existing corporations not one word was said. Indeed, there was nothing forbidden even as to future corporations except as follows: "*Hereafter* no corporation *shall be organized* for the purpose of carrying on *a trust company business* in the state of Washington except under this act, and no company *hereafter organized* under any other act *shall use the word* 'trust' as part of its name." Rem. & Bal. Code, § 3346 (P. C. 41 § 107). Nor is there reason to ascribe to the framers of this law an intention to interfere further than their words. Merely to prevent future organizations for "trust company business" except under the new statute may well have seemed sufficient, because it was universally conceded that the general statutes could not be used for the trust powers most profitable and the less important it might not have appeared wise to forbid.

The townsite company was organized after, the land company before, this special statute of 1903, the former in 1906 under our own general statutes, the latter in 1881 under those of Iowa, but so far as this trust statute is concerned we are clear that the dates of their creation are unimportant. Neither of them was organized to do a trust business and, as appears by their titles, neither had assumed the name, which two are the sole features forbidden. The corporate articles of each (omitting as to the land company the words "State of Washington") were as follows:

"To purchase, hold, lease, sell, and convey lands in the state of Washington; and subdivide and plat the same into lots, blocks, streets, alleys and public grounds and when so platted or subdivided to improve, sell, lease, or otherwise dispose of and manage the same, and to have and exercise all the rights, privileges and powers granted by the laws of the state of Washington in such case made and provided."

Such powers obviously do not aim at a trust business. Even where a corporation claimed powers "to act as agent in the sale and purchase of real and personal property," we were clear that this was not offensive to the trust company statute. *State ex rel. University Lumber & Shingle Co. v. Nichols*, 48 Wash. 605, 94 Pac. 196.

Nor was the particular transaction the doing of a trust company business. The element of trust by the townsite company is too simple to offend. That in performance the company would be a fiduciary in part is but an incident, for in no wise did the special statute forbid such fiduciary relation as might be taken on by non-trust corporations in their own lawful adventures for gain. To forbid those is not in the letter of the statute and it would be a foolish thing to ascribe to its spirit, since nearly all joint enterprises involve at times the custody of funds or temporary use of title for another's benefit or the acting for third persons. Where should we draw the line? In the negotiations and business relations of modern affairs a fiduciary relation may come today, be dropped tomorrow, and the following day be taken on again. It may even have to continue throughout. The corporation may be forced into the relation by sheer self-protection. Like an individual a corporation, in order to protect or conduct its own investments, may have to hold and distribute the funds and property of various people. We see no doing of a trust company business in its holding titles when it has an interest itself. In fact, it is very doubtful if what this company was doing in this instance could be done at all by a company organized under the trust company act.

The relation involved here is, moreover, the exceedingly common one, joint adventure, which may be found substantially defined at 23 Cyc. 453. Adjudicated instances occur in: *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705; *Braddock v. Hinchman*, 78 N. J. Eq. 270, 79 Atl. 419; *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914 C. 689. The courts have not forbidden such relations to corporations when within their particular powers or the statutes under which they came into existence.

The land company, it is next argued, was disqualified under our statute of 1890 relating to foreign corporations. Rem. & Bal. Code, § 3720, after granting foreign corporations the right to do business here, adds:

"Provided, further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized."

In *Realty Co. v. Appolonio*, 5 Wash. 437, 32 Pac. 219, we held that this section means what it says and applies only to foreign corporations organized afterwards. If any mischiefs lie either in our way of looking at this statute or in its own language, they must be small, for the legislature in a generation since has made the statute no tighter. Now the land company, organized in Iowa in 1881, presumptively enjoys the rule of the *Appolonio* case. However, it was not admitted to do business in this state until after this statute of 1890, so appellants contend that a certificate admitting it here is the same as "organized." We are clear to the contrary. Moreover, in the *Appolonio* case this very question was involved for, though the opinion does not, the record does show that the previously organized foreign corporation came be-

fore the court as filing its articles here after the statute. It is also contended that the land company still comes under the term "hereafter organized" by a subsequent amendment of its articles. It appears that when organized in 1881 this company did not have Washington in its authorized scene of operation. This power it got by amendment in Iowa in 1907 after which it took transfer from the townsite company and filed its articles here.

These two arguments of appellants do receive countenance from our decision in *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462, in which we denied a pre-existing corporation the right to change its name so as to include the word "trust," and held that as to the trust company act this was in effect the making of a new corporation. That decision, however, and the effect of the subsequent amendment of the land company's articles and of their filing here after the trust company statute as well as after the foreign corporation act of 1890, need not be discussed, for what we have to deal with here is not a power requested but a power already exercised. In the *Osborne* case it was sought to make the public officials issue a certificate in the new name. Here we have to do with conveyances past. Now our statutes have never declared void the excess acts of a foreign corporation. The statute, which might have said so, was content to impose only a penalty (Rem. & Bal. Code, § 3723 [P. C. 405 § 365]) and, speaking through Judge Rudkin in *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889, we held in harmony with previous utterances that the pecuniary penalty excluded others.

If, however, the objections to the land company's status run as much to a question of power as of local qualification, such as whether it could take the business at all or take it in Washington under its then articles, the answer is that only the state can question the corporate excess. *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 762.

In *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32, we said where the power of a corporation to hold lands for a specific purpose was questioned: "The objection would be valid only so long as the title remained in the corporation, and even then the title could only be questioned in a proper proceeding by the state," quoting the following from *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281, 286:

"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers."

We there made it clear with abundant citation that, until the state should attack, the corporation could transfer to others and we see no reason to deny this doctrine to the land company both as a holder and as a current vendor. Whether it was acting here before the filing of its articles or took the transfer before the amendment of its articles or acting in excess of what those articles empowered, it is a matter for state action. This has been held sound both where there was lack of power in the charter (*National Bank v. Matthews*, 98 U. S. 621, 628) and where the defect arose from noncompliance with local registration, *Fritts v. Palmer*, 132 U. S. 282, 291.

To conclude, several minor arguments of appellants we deem it unnecessary to discuss, and several assigned errors of detail in the lower court's decree, such as a partial wrong disposition of the depot grounds and in respect to a tract called the wye, we are satisfied from the testimony cannot be sustained.

The cross-appeal is without merit, and the judgment is affirmed.

MORRIS, C. J., HOLCOMB, ELLIS, MAIN, MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 13313. Department Two. June 20, 1916.]

W. H. MITCHELL, *Appellant*, v. BERLIN-McNITT COMPANY *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—CONTRACT FOR PUBLIC IMPROVEMENT—CONSTRUCTION. Under a contract for public work for a city, wherein the contractor agreed "to pay the wages of all persons and for assistance of every kind upon or about said work, and for all materials purchased therefor," and authorized the city to withhold payments until such wages, assistance and materials were fully paid for, the city was not warranted in withholding money for the purpose of paying claims for meats and groceries supplied a subcontractor, such articles not falling within the terms "assistance of every kind employed," nor of "materials," the latter term applying only to materials entering into the structure.

SAME. The rule rendering a public contractor liable on his bond for the price of all goods necessary to the performance of his contract does not apply when the action is not upon the bond but is one involving the construction of the contract between the city and the contractor.

MUNICIPAL CORPORATIONS—CONTRACT FOR PUBLIC WORK—ESTOPPEL OF CONTRACTOR. The fact that a public contractor had assured firms supplying provisions to a subcontractor that he had made arrangements to accept orders drawn on him by the subcontractor, to be turned over to a third party for payment, would not estop the contractor from claiming a particular fund retained by the city for the purpose of meeting such claims, where he accepted such orders and there was no misrepresentation or breach of promise on the part of the contractor, but the fund in the hands of the third party had been dissipated by payment to preferred creditors instead of by application *pro rata* to all the creditors.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered September 20, 1915, upon findings favorable to certain claimants, in an action to determine the liability on a contractor's bond. Reversed.

Weter & Roberts, for appellant.

Dysart & Ellsbury and *C. D. Cunningham*, for respondent Berlin-McNitt Company.

Higgins & Hughes and *William E. Froude* (*Hyman Zettler*, of counsel), for respondent Frye & Company.

[1]Reported in 158 Pac. 264.

HOLCOMB, J.—On December 15, 1913, appellant entered into a contract with the city of Centralia for the construction of a gravity water system. Pursuant to the contract, appellant as principal, and the Maryland Casualty Company as surety, executed a bond conditioned for the faithful performance of the contract. On account of the location of part of the work it was necessary to maintain a boarding camp to feed the men employed there, and appellant executed another contract with one McDermott, a subcontractor, by virtue of which agreement McDermott agreed to maintain a boarding house and feed the men employed by appellant, for a stipulated sum per week. Appellant fully completed his contract and the work was accepted by the city of Centralia. McDermott also entered on the performance of his contract but failed to pay for certain provisions, viz., meats and groceries used for feeding the men and furnished to McDermott by respondents Berlin-McNitt Company and Frye & Company, who thereupon filed their claims for the same with the clerk of the city of Centralia. The amounts of these claims, together with others not material to this appeal, were withheld by the city of Centralia from the amount owing to appellant on the contract. Appellant and the Maryland Casualty Company then instituted this suit to determine the amount and validity of these claims. All the claimants were made defendants, and they by way of cross-complaint sought to hold the fund retained by the city of Centralia and to secure a judgment against appellant and the Maryland Casualty Company. After a trial on the merits, the court below refused to enter a judgment on any of the claims against the Maryland Casualty Company or a personal judgment against appellant, but held that certain of the claimants were entitled to designated amounts of the funds withheld by the city, and ordered the payment of the same. Appellant has appealed from that portion of the judgment directing the payment of $780.05 to respondent Frye & Company and $521.45 to respondent Berlin-McNitt Company.

As the court refused to give any judgment on the bond, the correctness of the ruling of the trial court must depend on the construction of the contract between appellant and the city of Centralia, and the sole question raised by this appeal is whether meats and groceries are included within § 15 of that contract, which reads as follows:

"The said contractor agrees to pay the wages of all persons and for assistance of every kind employed upon or about said work, and for all materials purchased therefor, and the city of Centralia may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for."

It is maintained by respondents that meats and groceries are included within the phrase "and for assistance of every kind employed;" but from the ordinary meaning of the words "assistance" and "employed" as judged by common usage they pertain to some kind of services rendered, and this theory is strengthened by the position of this phrase in relation to the whole paragraph as it is directly connected with "to pay the wages of all persons" and separated by a comma from the phrase "and for all materials purchased therefor;" and since both the words "persons" and "assistance" are coupled with "employed," while "materials" alone is coupled with "purchased," we are led to the irresistible conclusion that this phrase was not intended to include meats and groceries but referred only to something in the nature of services, as respondents' contention would make the phrase "and for materials purchased therefor" mere surplusage.

It is also urged that groceries and meats are included within the word "materials;" but in *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106, the court held squarely to the contrary. It is true that the court was there construing a lien statute the construction of which is more strict, and that where the relation is purely contractual, as here, the construction is more liberal. We are not inclined to hold that "materials" means groceries and meats,

as it is substantially settled in this state what are materials in cases of this character, and its definition has never been extended to such an extent as to embrace provisions within its meaning, and we are unable to find any authority to that effect. We have uniformly held that material is something that enters into the structure subject to a lien. Mr. Webster defines material as "the substance or matter of which anything is made or may be made." It is evident that meats and groceries are not included within the terms of this definition, which is as broad as respondent could contend for.

The purpose of a provision of this character in a contract, as well as the bond required by law to be given by a contractor doing public work, is to take the place of a lien which does not lie against a municipality to insure to laborers and materialmen their pay, to the end that the municipality may make a more advantageous contract.

The authorities seem to sustain a more liberal rule in allowing recoveries for items in an action on a bond furnished by a contractor doing public work than in an action to foreclose a lien, and hold that on a bond furnished by a contractor the recoverable items are not limited to lienable items but the purchase price of all materials furnished may be recovered, whether lienable or not, if they were necessary to complete the contract. *United States, Use of Standard Furniture Co. v. Aetna Indemnity Co.*, 40 Wash. 87, 82 Pac. 171; *Zipp v. Fidelity & Deposit Co.*, 73 App. Div. 20, 76 N. Y. Supp. 386.

As it appears from the evidence that, on account of the locality of the work, meats and groceries to feed the men employed were necessary to complete the contract, respondents contend under the authority of the rule quoted above that they must prevail. But the cases in which this rule is announced are actions against the bonds, which bonds are conditioned to the faithful performance of the contract. It necessarily follows that, when those parties, by signing the bond, contract that they shall be liable unless the contract is

faithfully performed, they are liable for the price of all goods necessary to the performance of the contract by the very terms of the bond itself. But this rule is not applicable to the case at issue since there is no question on this appeal as to the liability on the bond but simply a question of the construction of the contract between appellant and the city of Centralia. Although liability was sought to be enforced against the bond, the trial court refused to enforce such liability and this portion of the judgment was not appealed from.

It is significant that the bond given by appellant was also conditioned that appellant should pay all persons supplying laborers, mechanics, or subcontractors with materials, *supplies or provisions*, and shows that respondents were not without a source of recovery of their claims, and that, in this instrument at least, provisions were not thought by the parties to be included in materials, and throws some light on the construction of the word "material" as used in the contract as these instruments were all parts of the same transaction.

The case of *Baker City Mercantile Co. v. Idaho Cement Pipe Co.*, 67 Ore. 372, 136 Pac. 23, cited by respondents, is clearly distinguishable from the present case though the court did say there that all the goods furnished by plaintiff, such as provisions, were necessary in the construction of the conduit and were embraced within the terms of the original contract with the city, and thus held the contractor liable. But it also appears that the liability attached by reason of an express oral contract between the plaintiff and the contractor, to the effect that the contractor would pay plaintiff for these supplies by holding out that amount on the wages of the men. In the case here the liability is sought to be enforced by virtue of § 15 of the contract between appellant and the city of Centralia, and the goods were not sold to appellant but to McDermott. While there is some testimony to the effect that appellant told respondents that he had

made an arrangement to accept orders drawn on him by McDermott, to be turned over to Hartman & Nathan to pay off McDermott's creditors, there is no evidence that appellant agreed to pay respondents for the goods they furnished McDermott, nor do respondents base their right to recover on that theory.

Finally, respondents suggest that, if the fund retained by the city of Centralia does not protect respondents, appellant at least should not be heard to claim it as he induced respondents, according to their testimony, to part with their property on the assurance to respondents that he had made arrangements to accept orders drawn on him by McDermott for all the money that he owed McDermott, to be turned over to Hartman & Nathan for the purpose of paying off McDermott's creditors. This suggestion should not prevail since there is no evidence that these orders were to be drawn on the particular fund now retained by the city of Centralia, and, so far as the record discloses, appellant did accept orders drawn on him to the amount of his indebtedness to McDermott, thus performing his promise in this respect. The fact that respondents were not paid in full was not due to any misrepresentation or breach of promise on the part of appellant that would create an estoppel, but because the fund was not applied to the different creditors *pro rata* by Hartman & Nathan, some of the preferred creditors being paid off first, thus dissipating the fund.

The judgment is reversed.

Morris, C. J., Parker, Main, and Bausman, JJ., concur.

[No. 13388. Department Two. June 20, 1916.]

LOUISE F. STERTZ *et al.*, *Appellants*, v. INDUSTRIAL INSURANCE COMMISSION, *Respondent*.[1]

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — CONSTRUCTION. The injury for which a workman is entitled to recover under the workmen's compensation act (3 Rem. & Bal. Code, § 6604-3), is one resulting from some fortuitous event, not necessarily accidental, which under 3 Id., § 6604-5, may have occurred away from the plant of the employer, if the workman were at the time in the course of his employment.

SAME. Under provisions of the workmen's compensation act excluding from compensation only wilfully incurred injuries, and those arising from diseases, and defining "injury" as used in the act as referring "only to an injury resulting from some fortuitous event," the right of compensation is not confined to injuries arising out of the employment nor to those of an accidental nature.

SAME. The workmen's compensation act of this state (3 Rem. & Bal. Code, § 6604-1 *et seq.*) is neither an employer's liability, nor an ordinary compensation act, but an industrial insurance statute, under which the remedy for rejected claims is against a fund in the hands of a state commission and not against the employer.

SAME. The workmen's compensation act (3 Rem. & Bal. Code, § 6604-1 *et seq.*) ends the jurisdiction of the court as to all phases of the master's liability to his servant for injuries resulting from fortuitous events, regardless of fault on the part of either, and remits the determination thereof to the industrial insurance commission.

CONSTITUTIONAL LAW — DUE PROCESS — WORKMEN'S COMPENSATION ACT. The due process clause of the Federal constitution is not violated by an act adding liability to the employer to his employee through the act of a stranger on the premises, nor by the provision of the act making the employer an insurer of the employee while at the employer's plant.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — INJURIES AWAY FROM PLANT. Under the workmen's compensation act (3 Rem. & Bal. Code, § 6604-1 *et seq.*) giving an employee or in case of death his dependents a right to compensation against the industrial insurance fund, if injured "upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer," an employee of a logging company killed by a shot from a

[1]Reported in 158 Pac. 256.

third person, while in charge of the company's logging train, is entitled to compensation from such fund without the necessity of electing to sue the stranger or to take under the compensation statute.

SAME—WORKMEN'S COMPENSATION ACT—CONSTRUCTION. The fact that the workmen's compensation act applies to "hazardous" and "extra hazardous" occupations does not restrict compensation merely to injuries arising out of the work, in the face of the express statutory provision including injuries from "fortuitous events" whether upon the premises or in the course of employment away from the plant.

SAME. The employment of the word "accident" is a substitute for "fortuitous event" in the administrative details of the workmen's compensation act and cannot be construed as limiting the right of compensation to only accidental injuries when viewed in the light of the positive definitions of the statute.

SAME. The provision of the workmen's compensation act requiring the employer to report all accidents and state whether they "arose out of or in the course of the injured person's employment," does not restrict compensation to accidental injuries, since such reports are not made a basis of compensation.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 24, 1915, in favor of the defendant, in an action for death under the workmen's compensation act, tried to the court. Reversed.

T. P. Fisk, for appellants.

The Attorney General and *John M. Wilson, Assistant* (*Chas. E. Arney, Jr.*, of counsel), for respondent.

BAUSMAN, J.—This is a proceeding by the widow and minor children of Stertz, foreman of a logging camp, to recover through the industrial insurance commission statutory compensation for death.

This foreman had suspended for misconduct a workman named Steel but had reinstated him. Steel, discharged a few days later by the president, waylaid the logging train and, wounding one, killed others of the workmen including Stertz, who was in charge of the train as foreman. Only those were assailed with whom Steel while a workman had

had quarrels concerning his tasks. The present claimants are not shown to have collected or sought damages from Steel, but their claims were rejected both by the commission and the superior court. The sole argument now made to sustain their rulings is that the statute contemplates only "accident" as that term is popularly understood and also as "arising out of" the employment. These words nowhere occur in any of the definitions or granting clauses of our statute. Far stronger terms occur.

We are now brought to a point where we must explore this noble legislation to obtain a general, decisive view.

Our legislators, with three systems to imitate, chose the most sweeping. There was that of England, which least interferes with employers, a liability act removing defenses but prescribing no way in which the employer must provide for the claim. There was that of Denmark and Sweden in which the state issues policies to the employed at the master's expense. Finally there was that of Germany which ours most nearly resembles and which provides both the remedies and the fund by compulsory insurance with contribution of employers collectively. Even the German scheme was somewhat exceeded, for the private parties under our law have no participation in the management, nor, during a first period of three months, does our workman contribute something toward the loss, as he did under the German.

Our act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the

workman was a cost of production, that the industry should bear the charge.

By the working class the new legislation was craved from a horror of lawyers and judicial trials. What they wanted, as this act expressly recites in its first section, was compensation not only safe but *sure*. To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than to get nothing. The workmen wanted a system entirely new. It is but fair to admit that they had become impatient with the courts of law. They knew, and both economists and progressive jurists were pointing out, what is now generally conceded, that two generations ought never to have suffered from the baleful judgments of Abinger and Shaw.

It is for us to say not whether our workmen ought to have a statute which insures them absolutely on the master's premises but whether they do have it. What they gave up for it is great, trial by jury and unlimited damages. The former was an undeniable advantage, the latter had often brought them five-fold what is afforded by this act, which gives not to exceed four thousand dollars for a life and fifteen hundred for the loss of a limb or an eye. What laborers desired was not mere removal of the old defenses. Moreover, the English statute that had removed these had already begotten whole volumes of contests over the new words "accident" and "arising out of employment." Well may ours have used unqualified words to create an undebatable recovery when the injury should occur at the place of work, which even the common law had required the master to maintain in safety.

Those who drafted our law had before them many foreign statutes during the long and careful preparation of this, so we are at once struck by the absence of many familiar terms. In some of those the right of action springs from "accident;" in others from an injury arising "during and in the course

of employment." The English statute is "personal injury by accident arising out of and in the course of employment." Simple as these terms appear, they have filled volumes with discussion. Not one of them appears in any of the enabling or granting provisions of our law. Wherever a right is conferred or definition given, ours is unqualified. Indeed, our statute is in these features the least qualified that can be found. The intention to get rid of judicial controversies apparent throughout, we have already recognized:

"Aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided." Chadwick, J., in *State v. Mountain Timber Co.*, 75 Wash. 581, 583, 135 Pac. 645.

Having seen what was not inserted, let us see what was. Let us examine definitions carefully made. The first section, after stating that industrial relations in all hazardous employments are matter for police regulation, that injuries are frequent and inevitable and that controversies about them are wasteful, declares that:

"*All phases* of the premises are withdrawn from private controversy, and *sure and certain relief* for workmen, injured in extrahazardous work, and their families and dependents is hereby provided *regardless of questions of fault* and *to the exclusion* of *every other* remedy, proceeding or *compensation*, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and *all jurisdiction of the courts of the state* over such causes are hereby abolished, except as in this act provided." Laws 1911, p. 345, § 1; 3 Rem. & Bal. Code, § 6604-1.

The third section, that of definitions, defines workman:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer." Id., § 6604-3.

We shall quote later a proviso appended to this definition and relating to injuries from third persons.

Dependent was defined as certain "relatives of a workman whose death results from any injury and who leaves surviving," etc.

The fifth section, the granting clause of compensation, is as follows:

"Each workman who shall be *injured* whether *upon the premises* or at the plant, or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, *shall receive* out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment *shall be in lieu* of any and all rights of action whatsoever against any person whomsoever." Id., § 6604-5.

Obviously and clearly the qualifying "in the course of employment" does not apply to "on the premises." Had that been intended, the arrangement was natural and easy. Thus, "When the workman is injured in the course of his employment either upon the premises or away from the plant." Surely we must assume a reason for the other peculiar order. Nor did that order come of chance. It is precisely repeated, we have just seen, in the definition of "workman." Even the punctuation is most carefully repeated there.

Injury too was given a definition: "The words injury or injured, as used in this act, refer only to an injury resulting from some *fortuitous event* as distinguished from the contraction of disease."

In this last we notice, first, not merely the avoidance of "accident" but of "arising out of the employment," the use of which this definition fairly invited if that were to be meant. Second, exclusion by enumeration. Disease is excluded; everything else is included. Lastly, "*fortuitous event*," the strongest term that could be used, no popular expression but one used by lawyers for positive strength, a term in truth

that is selected when one wishes all of "accident" and more. Black thus defines it:

"There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the 'act of God,' is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable."

Only one other kind of claim is excluded, that based on intentionally or wilfully incurred injuries. These the act itself elsewhere mentions and excludes without other language of consequence here.

We have now the provisions upon which compensation has to be granted or denied. The universally employed terms by which the injury must spring from the business are not there. Very opposite phraseology is used. The supreme court of the United States, in *Holden v. Stratton*, 198 U. S. 202, had occasion to consider the statute of this state which exempts the proceeds of life insurance policies from creditors. That our statute was using extreme, almost unreasonable, language being pointed out, it was argued to the court that the words must therefore be given more moderate meaning and must be interpreted in the policy of milder statutes of other states, but the supreme court said:

"The wide departure from the legislation of many of the other states, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary conclusively shows the intention of the Washington legislature to adopt a broader and more comprehensive exemption."

To resume, ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an in-

surance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued. Nor is the commission so much as selected by the parties. The state administers the fund. Few foreign countries had yet adopted a scheme so comprehensive. Germany alone furnished a precedent. In subsequent legislation in this country only one or two states have adopted this principle and none have pushed it so far.

To sum up, our act positively ends the "jurisdiction of the courts," on "all phases" of master and servant liability. Now it is undeniable that liability for a stranger's acts *on the premises* is one of those phases, undeniable that in nearly every such case a question immediately arises whether it is not the master who may have to respond. But, it is said, we cannot hold such liability indisputable under this statute without establishing a construction that would make the master liable for such extreme things as death by lightning. Let us, therefore, review the statute again with both kinds of accident in view.

We have seen that, as the first section put an end to all civil actions appertaining to master and servant liability, so the fifth declared that the compensation "shall be in lieu of any and all rights of action whatsoever *against any person whomsoever.*"

Next, we have seen in the first section that compensation is to be paid *regardless of fault.* Thus there was to be compensation for some injuries not actionable before. For instance, let a machine which was excellently made, excellently inspected, and excellently operated cause injury by capri-

cious action contrary to all human experience, in a word let nobody be to blame, a servant under the common law could not recover for the master had not been at fault. Yet that this act means to give compensation in just such a situation can never be questioned. We start accordingly with liabilities before unknown, "a sure and certain relief for workmen regardless of questions of fault."

From the outset the creating of new liabilities was conceded. In the first debate in this court over the act an opening challenge was the new liability without fault taking away the employer's due process of law, and an illustration was given which it was thought would make the law ridiculous. Let the workman while at work be injured by a stranger's throwing something in from the street, there would be a claim for recovery; he would be injured "on the premises;" the injury would be from "fortuitous event." That such a claim would seemingly come under the act was referred to but left undecided by Justice Fullerton in his exhaustive opinion (*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466). He held under indisputable precedents that, notwithstanding the due process guaranty, courts had already sustained statutes imposing degrees of liability regardless of fault, and these decisions sustained ours in most of the new liabilities. As to others, if these were improper, the act by its own terms could stand without them. The apparent scope of the statute he conceded:

"It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects, but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one." Id., pp. 196, 197.

It is curious that the very illustration flung at our act to make it ridiculous has not been held ridiculous even under the narrow English statute. In *Challis v. London & South-Western R. Co.*, 2 K. B. (1905) 154, it was held that the employer was liable for the death of a locomotive engineer injured by a stone thrown from a bridge above by a mischievous boy.

Nor can we see that under the constitutional objection of due process of law the complaint of the employer is sounder when he pays for injuries caused by the meddling of a stranger on the premises than when he pays for injuries from a perfect machine. The question is one of degree and often of small degree. For, that the master should have every possible inducement to shield his workmen at their tasks from the meddling of third persons is plain, and instances are simple where his failing so to protect them must make him liable at common law. Having pronounced constitutional, then, an act which compels both employers and employed to go into a scheme of insurance, we do not hesitate to say that the difference in new or added liability by the act of a stranger on the premises is not enough to make it unconstitutional. It is but a slight extension of the common law assurance of a safe place to work. Neither would it be a violation of the due process guaranty to make the master an insurer of the workman at the shop. The supreme court of the United States in upholding the Nebraska statute making railways insurers of passengers (*Chicago, R. I. & Pac. R. Co. v. Zernecke*, 183 U. S. 583), said:

"Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributed to its owner."

Turning back now to the definition of workman, we may read that again with its immediate proviso:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries

scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, however*, That if the *injury* to a workman *occurring away from the plant* of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, *shall elect* whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case." Id., § 6604-3.

With the whole section before us we perceive that, when a workman is injured off the premises by a stranger, he must elect whom he shall sue, and that no electing is imposed on him when he is injured by a third person upon the premises. Of the latter situation nothing is said. Now from this silence one of four things must be true. Either when thus injured on the premises he has no right whatever to collect from the fund, or he has the right to collect from both the fund and the stranger, or only from one and then with waiver as to the other, or lastly only from one without waiver. The second conclusion is grossly improbable; the third would unfairly make him elect at his peril; the last, plausible, is illogical, for since he has to elect when the third person injures him off the premises, why not when injured upon them too? What possible reason for the right or necessity in one case and not in the other? Nothing answers this satisfactorily except the first conclusion, that when injured upon the premises only one defendant is possible. This conclusion is irresistibly supported, first, by the words, "in lieu of any persons whomsoever," found in the compensation section al-

ready quoted; second, by the arrangement of the words "in course of employment," and lastly by the policy of this act which may well be supposed to end debate over involved situations while furnishing to the master the highest inducement to protect his workmen from inquisitive strangers, meddlers, careless cooperating employees, or dangerous persons of any sort.

In fine, this difference between the main clause and the proviso lies in the act's conceding an exclusive claim against the employer for all injuries on the premises by strangers. This last was reasonable. When an injury thus occurs, there must so often be involved the relations of the employer with that stranger or the character of the employment itself as inviting strangers, that we can see a policy of unqualified right against the fund. Suppose a visitor invited to the factory by the employer cause the injury. Is the fund liable? If so, is it liable also when the visitor comes without invitation? Is it liable if the injury occur in a room where the stranger ought not to have come and the workman, knowing he ought not to have come, should have put him out? Endless are these distinctions. Is a dray company to answer for an injury to a factory hand caused by one of its teams in a part of the factory where the owner of the factory ought not to have let it come? Is the fund to be sued or the dray company? Why is the workman compelled to make the perplexing decision? Why is it not better policy that the master shall keep his premises at all times secure?

That against some third persons the workman has no suit for injuries on the premises this court has already decided. Even without considering the proviso about injuries off the premises (a portion of the statute not pressed upon the attention of the court), we held in *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915 D. 154, L. R. A. 1916 A. 358, that the fifth section, stating the compensation to be "in lieu of any and all rights of action whatsoever against any person whomsoever," prevents personal suit against the presi-

dent of a railway company for injuries in the company's operation, though to him personally the particular neglect was charged. The workman's claim must be against the fund. We made emphatic not only the words just quoted from the act itself, but also that the compensation was to cover as we expressed it ourselves, "every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed," because the statute said that the abolition of actions theretofore existing was "irrespective of the persons in favor of whom or against whom such right might have existed."

Just before this decision Judge Cushman in the Federal district court for this district had reached the same conclusion from the statute alone. (*Meese v. Northern Pac. R. Co.*, 206 Fed. 222.) A brewery employee, he held, could not elect to sue a carrier which had injured him at the plant. His judgment was reversed by the circuit court of appeals though our *Peet* case was then before it. It distinguished that case on the ground that the company's president though personally sued must not be treated as a third person or stranger; but the supreme court of the United States has in turn reversed the intermediate court and has construed the *Peet* case as confirming the conclusion of Judge Cushman. *Northern Pac. R. Co. v. Meese*, 239 U. S. 614. Judge Cushman, it may be added, had commented on the force of the proviso in the section we have discussed.

In *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153, we followed the *Peet* case, and denied the right to sue an employer's surgeon for malpractice after award accepted from the commission for the loss from the injury. The authorities and the purpose of the law were exhaustively reviewed by Justice Chadwick and the conclusion repeated that suit against third persons for injuries on the premises was abolished. The court laid emphasis on that part of the

statute which forever removes "all phases" of the liability during employment.

Authority accordingly is added to both policy and expression. The right of suit against third persons for injuries on the premises is taken away from the workman. To whom then does he look? Since the stranger cannot be made to pay him, the fund must. It would be intolerable to suppose that for this wrong he should have no redress at all.

To pronounce unqualified liability for injuries at the workshop grows easier the more it is considered. Shall we repulse the workman injured, say, in voluntarily fighting flames, or defending his master against assault, or the passengers on a train from a bandit? These are acts not to be discouraged and yet not paid for at common law. The workman who flees at such a time is viewed with contempt. Is he to pay himself for the burns and blows? The English courts, we may observe, have compensated "emergency" acts done in the interest of his employer: *Rees v. Thomas*, 80 L. T. R. 578; *Harrison v. Whitaker Brothers*, 16 T. L. R. 108; *Whelan v. Moore*, 43 Ir. L. T. 205; and even his voluntary attempt to save the life of a fellow employee: *Matthews v. Bedworth*, 1 W. C. C. 124. If our statute aimed to cover them all it is not extraordinary. Even a few unusual causes of injury may well be charged to the fund, some of which will on reflection, it may be added, be found less unfair to the employer than at first consideration. Let us take an example. To say that the master notwithstanding the strength of "fortuitous event" might be liable if the workman was struck by lightning, seems at first preposterous. But let us look at the workman's point of view. The latter argues in effect, that if he had not been at the factory that day he would not have been struck by lightning, that it was the purpose of this act to give the workman every reason for fidelity and courage at the place of work, that part of the basis for the statute was the fact that the workman can seldom carry his own insurance, and that on his sudden death

his widow and children are too often a charge upon the community.

The purpose to get rid of contention is the plainer when we consider in how many adjudicated cases under the other statutes the injured man is forced to argue about "arising out of the employment." Notwithstanding that noon recesses at the workshop are generally conceded to be hours of employment in those statutes, we have a workman in one decision injured while going from a higher to a lower floor at noon to receive a free lunch served by the employer. He must go to law about it. Was he or was he not in the course of employment? Again, a workman's claim was contested when during excessively hot weather he went to the roof in working hours for cooler air and fell to the street. So, a boy employed to piece together broken ends of yarn good-naturedly attempted to clean a machine and was injured. Not hired to clean machines, he was held not to have been hurt "in the course of employment." Such are the debates on which claimants really within the purpose of these laws have often had to waste their compensation in other jurisdictions.

Let it be remembered, too, that the employer himself is no longer liable, that doctrines which might seem harsh were this an employer's liability act or the common law still prevailing, are now reasonable under assessment upon the industry at large. This insurance scheme is founded on contributions on both sides, the workman contributing his reduced damages, the employer getting that and conceding more liabilities.

The best argument against the construction to which we are tending would be that under it recovery would be possible for some fortuitous events that under no circumstances could spring from a fault of the employer. Yet the further we search the more difficult it is to find any such. Death by lightning, it might be said, would be an instance, death from a wanton pistol shot. As to the latter the English courts

have had to arrive at a conclusion. A gamekeeper was shot by a poacher. Even under the rigid English act, "accident arising out of" the employment, it was finally held that this was an accident (though the common understanding of that term is certainly not death by assault), and that it arose out of the employment. *Anderson v. Balfour*, 2 Ir. Rep. (1910) 497. Now if this be thought a conclusion none too strong, what shall be said about the case of the cashier who, while carrying his master's money, was assaulted and robbed? This was held to be an accident arising out of an employment. *Nisbet v. Rayne*, 2 K. B. (1910) 689. So as to injury from lightning. Some situations during storms are more hazardous than others. Various kinds of machines invite the electrical contact from the skies while others do not. In short, the employment or the orders of the master may have a good deal to do with the injury of the workman in an electrical storm. A case has recently been decided in Minnesota, where a driver struck by lightning was allowed judgment as from an accident: *State ex rel. People's Coal & Ice Co. v. District Court* (Minn.), 153 N. W. 119. So in the English case of *Andrew v. Failsworth Industrial Society*, 90 L. T. R. 611, the master was held liable for death by lightning when the workman during the storm was at work on the top of a building.

Now, if there be any occasion in which damages can be had for death from lightning, the policy of our law might be to have no debate about it in any instance, because if the workman must contend when he has not the right to recover, he will have to contend also when he has the right to recover. Let us recur to the child who was injured in oiling machinery when he was hired only to work at strands of yarn. From an economic, sociological standpoint it is waste to throw the child helpless upon society for what may have been a well-intended though mistaken act during employment. If he has to debate in a situation like that, then he

may have to debate when he walks from his own machine to lend a hand at a co-worker's machine on the other side of the room.

To seek authority in the decisions of other states is useless, for other statutes have no resemblance to ours. Those decisions are but painful struggles at interpretation of "arising out of," "accident," and "course of employment," which we believe were intentionally left out of our statute. Only one good is found in looking at those cases. They show what evils of litigation are escaped in our enactment. For instance, the Connecticut case of *Mann v. Glastonbury Knitting Co.* (Conn.), 96 Atl. 368. A room was heated by a pipe two feet in diameter, which brought in warm air. With the acquiescence of the employer workmen would place coffee bottles at the mouth of this pipe, but when one placing his at another opening was injured by a revolving fan, it was held that the injury did not "arise from the employment," notwithstanding it was conceded that employers were liable for injuries suffered by workmen in doing something "outside of obligatory duty permitted for mutual convenience, such as eating his dinner on the premises." These cases show the refinements to which courts are driven, the contests which workmen have to make at every turn under statutes of a qualified sort, that the new controversies over "arising out of" are but revivals of old contests over contributory negligence and assumed risk, though to get rid of these was the express announcement of the law. In our own court an instance is afforded. A workman injured by hernia resulting from a great strain in lifting at his work got his relief only after this court was reached. *Zappala v. Industrial Insurance Commission*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916 A. 295. It is perfectly plain that there was a charge which the industry should bear, but assuming in this act the word "accident" and the phrase "arising out of the employment," contest was at once made possible and contest was

prolonged. Another instance of our own is *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 311. A carpenter in a department store turns on an electric switch in a repair shop to start the wheel on which he would grind a tool. The electricity was not in his care or department. He was compelled to obtain the decision of our highest court before he could get his redress.

We decline to read into our act either the narrow word "accident" or the phraseology found in the English and other statutes. We prefer to leave it the force of clear and positive language designed to cure the past mischiefs of endless contention. The reports of other states already abound in contests over the new phraseology. It is for the legislature not for this court to modify, if it appear wise so to do, the plain language of our statute.

We have not overlooked an argument in the word "hazardous" and "extrahazardous." Since, it is said, the act compensates only persons in such employments, it meant to compensate them merely for injuries arising out of the work. This is fallacious. In the first place we cannot sustain that construction against plain terminology. Second, the circumstances show a difference in the intention. The workman was giving up unlimited damages and trial by jury. He could in exchange make for his class what terms he pleased, and the statute made those terms between him and his employer. That nonhazardous employments were not making terms too is of little moment.

"Accident," it is urged, does appear in sundry administrative sections of the act. Now it does not appear in any parts deliberately stating the basis of compensation, and even injury was powerfully defined as fortuitous event. "Accident" was used for brevity as a convenient substitute for "fortuitous event" in the administrative details of the act, and no court must construe a statute by general intent against positive definitions.

In one section the employer, being required to make reports of accidents, is directed to state whether the accident "arose out of or in the course of the injured person's employment." By no language whatever is this section made the basis of compensation or so connected with the compensatory provisions of the law as to give it other than statistical value for information to the department. Moreover, in the preceding clause it is stated that the report must be made whenever any accident or injury whatever occurs. This section, in short, makes no attempt to indicate which shall be paid.

In conclusion, even judicial decisions under the qualified statutes show that we can give full vigor to "injured on the premises" without raising a host of claims untolerated elsewhere. We have seen, in a word, the cases of lightning, of protecting a fellow employee, of the engineer killed by the boy from the bridge, of the assaulted cashier, and the assassinated gamekeeper. But since each new situation has always some difference, it is an infirmity if workmen are compelled always to argue over interpretation. Interpretation by instance is endless. The framers of this law having said positively that they wish the jurisdiction of courts ended on these controversies, it is our duty to give liberality as much to that as to other provisions of the law.

The situation indeed does not greatly differ from that which once obtained in life insurance. The early policies reserved to the company a perpetual question for any misrepresentations made to obtain them, and while this right was rarely exercised, yet it was exercised at times, and the right to exercise it was found so disquieting that the practically unqualified policy has taken the place of the other. To obtain this situation under the compensation act was undoubtedly the purpose of the workmen. It is also to our mind the language of the law.

Under our statute the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises.

The judgment of the lower court is reversed and the cause remanded with instructions to enter a judgment against the commission for the amount of appellant's claim.

MORRIS, C. J., MAIN, HOLCOMB, and PARKER, JJ., concur.

[No. 13425. Department Two. June 20, 1916.]

NELLIE R. GRIFFITH, *Administratrix etc.*, *Appellant*, v. M. O. JAMES *et al.*, *Respondents*.[1]

EXECUTORS AND ADMINISTRATORS—DE BONIS NON—POWERS—ACTION OF UNLAWFUL DETAINER. On the death of a husband serving as an executor for his deceased wife's one-half of the community estate, the right of action against a tenant for unlawful detainer passes to the administrator *de bonis non* of the community estate and not to the administrator of the deceased executor.

EXECUTORS AND ADMINISTRATORS—POWERS AS AGAINST HEIRS. Actions to recover both real and personal property may be maintained by an executor or administrator even against those claiming the property as heirs or devisees.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 29, 1915, dismissing an action of unlawful detainer, on granting a nonsuit, after a trial to the court. Reversed.

H. W. Lueders, for appellant.

PARKER, J.—This is an unlawful detainer action wherein the plaintiff, Nellie R. Griffith, as administratrix *de bonis non* of the estate of Jennie V. Thomas, deceased, seeks recovery of the possession of premises situated in Tacoma, and also rent claimed to be due thereon from the defendants, M. O. James and wife. The case proceeded to trial in the superior court for Pierce county, sitting without a jury, when, at the close of evidence introduced in plaintiff's behalf, the court, on motion for nonsuit made by counsel for the de-

[1]Reported in 158 Pac. 251.

fendants, granted the same and entered its order dismissing the action. From this disposition of the case the plaintiff has appealed to this court.

On October 14, 1913, August Thomas and Jennie V. Thomas were husband and wife and then owned as their community property the premises here in controversy. On that day, Jennie V. Thomas died, leaving a will naming her husband as executor thereof. This will was duly admitted to probate in the superior court for Pierce county, and August Thomas duly qualified as executor thereof on December 30, 1913. Soon thereafter he rented the premises to respondents M. O. James and wife at a monthly rental of $20, which was paid by them up until February 8, 1914. On June 15, 1914, August Thomas died, leaving the estate of his deceased wife and of the community composed of himself and his deceased wife unadministered, and appellant Nellie R. Griffith was soon thereafter, by the superior court for Pierce county, duly appointed administratrix *de bonis non* with the will annexed of the unadministered estate. She duly qualified as such on June 27, 1914, and has ever since been the duly qualified and acting administratrix *de bonis non* of that estate. On March 10, 1915, proceeding under the unlawful detainer statute, she caused to be served upon respondents James and wife a notice demanding that they pay the rent in arrears, which she claimed then amounted to $260, and that they vacate and surrender the premises. Respondents having declined to comply with these demands, this action followed. The above noticed facts are admitted by the pleadings in the case. The testimony of appellant given upon the trial was in substance that respondents were in arrears in payment of the rent from the 8th day of February, 1914, in all thirteen months, amounting to $260, and also that respondents had admitted to her that the rent accruing after that date had not been paid. It would seem then that appellant had clearly made a *prima facie* case entitling her to

recover as administratrix unless her testimony as to the balance due upon the rent is to be disregarded.

We are somewhat at a loss to understand the exact grounds upon which counsel for respondents rested their motion for nonsuit other than the general ground stated therein, that conceding all the evidence introduced to be true, appellant was not entitled to recover. We are also somewhat at a loss to understand the exact grounds the trial court rested its ruling upon in dismissing the action upon this motion. Remarks of the court made in disposing of the case render it apparent that its decision was not rested upon the insufficiency of the evidence so far as the merits of the case is concerned. The court observed: "If the plaintiff recovers in this action I cannot see but what the executor of the Thomas estate (evidently meaning the estate of August Thomas) might demand payment for the same thing."

It seems plain from the provisions of Rem. & Bal. Code, § 1429 (P. C. 409 § 253), that appellant as administratrix *de bonis non* succeeded to all the powers and duties of August Thomas as executor. In 11 R. C. L. 421, the general rule in such cases is stated as follows:

"When an administrator dies the title to all unadministered and unconverted assets passes to the administrator *de bonis non*, and must be administered by him, and not by the administrator of the first administrator."

It has also become the settled law of this state that actions to recover both real and personal property may be maintained by an executor or administrator even against those claiming the property as heirs or devisees. *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; Rem. & Bal. Code, §§ 1366, 1449, 1534, 1535 (P. C. 409, §§ 669, 293, 485, 487).

We are not favored with a brief in behalf of respondents. On the record before us, we are constrained to hold that the learned trial judge fell into error in granting the motion for nonsuit made in respondents' behalf. The judgment of dis-

missal is reversed, and the cause remanded to the superior court for further proceedings not inconsistent with the views herein expressed.

MORRIS, C. J., HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13515. Department One. June 20, 1916.]

ELIZABETH J. W. SHIPPEN, *Respondent*, v. ELIZABETH W. SHIPPEN, *Appellant*, JOSEPH SHIPPEN *et al.*, *Defendants*.[1]

APPEAL—NOTICE—PARTIES—SURETIES ON COST BOND. Where the surety on the cost bond of a nonresident plaintiff was not served with notice of appeal from a judgment in favor of his principal, the appeal should be dismissed, in view of Rem. & Bal. Code, § 496, providing for judgment, as of course, for costs against the surety on a cost bond whenever judgment is rendered against his principal; since the filing of the bond is an appearance in the action (FULLERTON, J., dissents).

Appeals from judgments of the superior court for Chehalis county, Sheeks, J., entered September 14, 1914, in favor of the plaintiff, in actions to set aside conveyances of property as in fraud of the rights of a creditor, tried to the court. Appeals dismissed.

Z. B. Rawson, for appellant.

Halverstadt & Clarke, for respondent.

CHADWICK, J.—Plaintiff brought three several actions against the defendants in the court below. Judgments in favor of plaintiff were rendered, and defendant Elizabeth W. Shippen has appealed. Plaintiff is a nonresident and was compelled to furnish a bond as security for the costs of the several actions as is provided in Rem. & Bal. Code, § 495 (P. C. 81 § 1317). The notices of appeal were addressed to plaintiff Elizabeth J. W. Shippen. They were served

[1]Reported in 158 Pac. 247.

upon her and upon Joseph Shippen. No service was made upon the surety upon the bond for costs. Plaintiff has moved that the appeal be dismissed for failure to serve all parties having an interest in the judgment. Rem. & Bal. Code, § 1720 (P. C. 81 § 1191).

This court has heretofore held that, where a judgment had been taken against bondsmen or sureties for a party in the court below, they were parties to the judgment, and that the appeal should be dismissed unless they were served with a notice of appeal. *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013; *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933; *State ex rel. Billings v. Port Townsend*, 27 Wash. 728, 67 Pac. 1135.

Or, if no judgment had been taken against bondsmen or sureties in the lower court, they were not parties to the judgment, and service upon them was unnecessary. *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Wagner v. Royal*, 36 Wash. 428, 78 Pac. 1094.

In *O'Connor v. Lighthizer*, the court held that, inasmuch as the statute made no provision for the entry of a judgment against the sureties upon a cost bond as a matter of course, their liability depending upon an independent action or to "their day in court," as it is said, they were not parties appearing in the action upon whom notice of appeal is required within the meaning of Rem. & Bal. Code, § 1720; Bal. Code, § 6504, and a dismissal of the appeal was accordingly denied.

The legislature, at its session held in 1909, passed an act directing the entry of a judgment against the surety as well as the one primarily liable upon a cost bond. The act has passed into the code, § 496:

"Whenever any bond or undertaking for the payment of any costs to any party shall be filed in any action or other legal proceeding in any court in this state and judgment should be rendered for any such costs against the principal

on any such bonds or against the party primarily liable therefor in whose behalf any such bond or undertaking has been filed, such judgment for costs shall be rendered against the principal on such bond or the party primarily liable therefor and at the same time also against his surety or sureties on any or all such bonds or undertakings filed in any such action or other legal proceeding." (L. '09, p. 633, § 1.)

By this act the legislature provided that a judgment should be entered against the sureties as a matter of course. The rule of the statute making the surety a party to the proceeding irrespective of the question of judgment seems more reasonable than the rule of the *O'Connor* case, for the surety, having no interest in the merit of the case, and being bound only to meet the condition of his undertaking, should not be heard to deny his liability when a judgment is rendered against his principal, or to insist that an independent action be waged against him.

The reason for the rule having failed or, to be more exact, having been overcome by statute, the holding is compelled that a filing of a bond is an appearance in the action by the surety as held under the claim and delivery statute which we shall presently notice. Otherwise a judgment, as of course, could not be sustained upon constitutional grounds.

It is provided by statute that the court shall enter a judgment against the surety upon a forthcoming bond when entering a judgment against the principal. Rem. & Bal. Code, § 577 (P. C. 81 § 899). We have held from the first that a surety under this claim and delivery statute had appeared in and had become a party interested in the result of the action, and as such, was entitled to notice of an appeal. *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641, and cases cited. That case is in point. The statutes, Rem. & Bal., §§ 496 and 577 (P. C. 81 §§ 809, 899), are the same. Each of them makes the surety a party to the action, and gives him an interest in the judgment. It can make no difference in principle whether a judgment is entered against the surety in the court below or whether it is not.

So long as the judgment is subject to a review upon appeal, and if reversed, the surety would be subject to a summary judgment, he is entitled to notice.

We said:

"Sureties upon a claim and delivery bond appear in the action, within the meaning of the statute, and that a notice of appeal is fatally defective which is not served upon the surety." *Long Bell Lumber Co. v. Gaston, supra.*

For the reasons assigned, the appeal is dismissed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

FULLERTON, J., dissents.

[No. 12845. Department One. June 21, 1916.]

THE CITY OF SPOKANE, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY *et al.*, *Respondents*.[1]

HIGHWAYS—ESTABLISHMENT—USER. A permissive use by the public of a private way, lacking in the elements of use under a claim of right and of use adverse to the owners, does not ripen into a public right, no matter how long the use may have continued.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 1, 1914, in favor of the defendants, in an action to recover land as a public highway. Affirmed.

Wm. E. Richardson, Ernest E. Sargeant, and *Dale D. Drain*, for appellant.

Charles S. Albert and *Thomas Balmer*, for respondent Great Northern Railway Company.

Post, Avery & Higgins, for respondent Washington Water Power Company.

FULLERTON, J.—In this action the city of Spokane seeks to have a certain tract of land adjudged to be a public high-

[1]Reported in 158 Pac. 244.

way. The tract consists of a parcel of land seventy-five feet wide and about one hundred and fifty feet long lying westerly of Howard street, and between that street and the eastern terminal of Mallon street, both being public streets of the city named. The city relied for recovery on adverse user for the period of the statute of limitations, averring in its complaint title in itself by reason of such user, and an adverse claim thereto made by the defendants the Washington Water Power Company and the Great Northern Railway Company. The companies named, in their answer to the complaint, denied the title of the city and set up affirmatively title in themselves. After a trial on the issues framed, the court adjudged the property to be the property of the defendants, further adjudging that neither the city nor the public had any right, interest, title, or estate therein. The city appeals.

The facts as we read the record are not seriously in dispute. The tract in question, while within the boundaries of the city of Spokane, has never been platted or dedicated as a street, nor was a highway ever established over it by any of the means provided for the establishment of highways by the statutes of the state. The legal title to the tract since its patent by the government has been held in private ownership. It now forms a part of two larger tracts, the title to one of which is in the Washington Water Power Company, and the title to the other in the Great Northern Railway Company, each of which holds by mesne conveyances from the government patentee. Each of these companies use the part owned by it in the prosecution of its general business; the Great Northern Railway Company as a right of way for certain of its terminal tracks, and the Washington Water Power Company for the same purpose, and also as right of way leading from the public streets named to certain flouring mills which it has constructed near the tract, and which it leases to corporations engaged in the manufacture of flour; the buildings and their surroundings occupying all of

the space on the south side of the disputed tract between the streets named.

The earliest use of any part of the tract as a public way was made by persons freighting from Spokane north to the Colville country between the years 1881 and 1885. A new bridge had been constructed over the Spokane river about that time, and the way across the tract furnished a more convenient route from the bridge to the highway leading to the country named than the established ways afforded. But no one then claimed the way to be a public way. It was used merely because the then owner of the property did not see fit to prohibit its use. The road itself, moreover, has long since been obliterated. It can be traced now only indefinitely and by reference to natural monuments. At no point is it now open unless it be for a short distance on the tract in question.

The first of the flouring mills mentioned was originally constructed in 1887. At this time a way was opened from the terminal of Mallon street to the mill for the use of the builders and the patrons of the mill. The mill building faced the old traveled way, and some use of the newly opened way with the old way was made by the public. The mill first built was destroyed by fire and rebuilt in 1892. It was destroyed a second time and rebuilt in 1902, and for the third time in 1909, and rebuilt in the following spring months. The last building was constructed some thirty feet farther north than the earlier buildings and covered practically all of the remaining portion of the old traveled way. After the completion of the last building, a way was opened by the builders between the two streets named for the use of this mill and the other mill mentioned which was constructed to the west of the earlier one. This way has since been used and is now used by such of the public as have occasion to pass between the streets named. The use, however, has never been exclusive. The mills in question do an extensive business. Motor vehicles and vehicles drawn by teams are con-

stantly being loaded and unloaded in front of the mill buildings in the way in question, and the public use of the way has always been subordinate to this use.

The city has by repeated acts recognized respondents' ownership of the property, some of the acts occurring within recent years. On July 3, 1893, an effort was made by the board of public works to procure a right of way across the property from its owners, the board reporting in September of the same year that it was unable to do so. On April 28, 1908, it passed an ordinance directing the corporation counsel to condemn the land for a public way. This ordinance was only repealed some three days before the conclusion of the trial of the present action, and was made to take effect immediately under an "urgency and emergency" section of the repealing ordinance.

In the foregoing outline of the evidence, many circumstances thought material by the parties have not been mentioned, yet we feel that it is needless to further pursue the inquiry. The law relating to the establishment of highways by user is well settled. The use must be an actual continuous use by the general public, under a claim of right, adverse to the true owner, for the statutory period. A permissive use of a way, no matter how long continued, does not ripen into a public right. It is our opinion that the use made of the property does not comply with the requirements of the rule. It has lacked the essential elements of use under a claim of right, and of use adverse to the owners of the property. The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13160. Department One. June 21, 1916.]

MAUSOLEUM SALES COMPANY, *Appellant*, v. F. L. MORGAN *et al.*, *Respondents*.[1]

CEMETERIES—SALE OF CRYPT—CERTIFICATE—EXECUTION. A corporation holding a contract of subscription for the purchase of a burial crypt cannot recover from the subscriber upon the tender of a certificate for the crypt made by another corporation which at the date of the certificate neither had title to the property nor had any corporate existence.

CEMETERIES — SALE OF CRYPT — CONTRACT FOR DEED — TENDER OF CERTIFICATE. Where a contract for a cemetery crypt provided for the delivery of a deed free of all incumbrances, the tender of a certificate in place of a deed was inadequate.

TENDER—KEEPING GOOD. Tender of a certificate for a cemetery crypt, not kept good by being brought into court, is not sufficient to sustain recovery upon a contract for the purchase price.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered April 27, 1915, dismissing an action on contract, upon granting a nonsuit. Affirmed.

Martin F. Smith, for appellant.

Morgan & Brewer, for respondents.

FULLERTON, J.—On June 24, 1913, respondent F. L. Morgan executed the following instrument to appellant:

Mausoleum Sales Company,
1111-1114 White Building,
Seattle, Wash.
Private Family Rooms Containing Ten
Tombs, $3,500.
Price of Tombs, $200-225.
Hoquiam, Wash., June 24, 1913.

I, the undersigned, hereby subscribe for one Compartment in the Hoquiam Cemetery Compartment Mausoleum at Hoquiam, Washington, and authorize the Mausoleum Sales Company of Seattle, Washington, to have constructed and deeded to me, free of all incum-

[1]Reported in 158 Pac. 255.

brances, the said Compartments for which I promise to pay said company or order, the sum of two hundred dollars at 1st Nat. Bank at Hoquiam, Wash., as follows: One-third of the above sum when the foundation of said Mausoleum is in; one-third when the walls and compartments are constructed to the square ready for the roof, and the remaining one-third when the building is completed.

(Signed) F. L. Morgan
447 Chenault Ave.

Accepted June 24, 1913.
Mausoleum Sales Company,
By G. H. Cuthbert, Pres.

On April 10, 1914, the Hoquiam Community Mausoleum Association executed to respondent the following certificate:

The Hoquiam Community Mausoleum Association (Incorporated).

This certifies, that F. L. Morgan of Hoquiam, County of Chehalis, state of Washington, is the owner of one crypt in the Hoquiam Community Mausoleum in Prospect Hill Cemetery, Hoquiam, Chehalis county, state of Washington, as the same appears in the records of said Mausoleum Association in the office of its Secretary, known and designated as Crypt 2, Row B, to have and to hold the same forever subject, however, to the rules and regulations of said Association.

In Witness Whereof, The said Association has caused this instrument to be signed by its duly authorized officers this 10th day of April, 1914.

W. L. Adams, President.
C. H. Wise, Secretary.

On April 28, 1914, the Hoquiam Cemetery Association conveyed to appellant by warranty deed lot 70 in block 3 of Prospect Hill Cemetery. This deed contained the following recital:

"This grant is made to the grantee for burial and cemetery purposes only; and is hereby made subject to all the rules and regulations now in force or hereafter to be adopted by the grantor for the use of said land and the beautifying thereof for cemetery purposes."

By deed dated May 25, 1914, but acknowledged on June 9, 1914, the appellant conveyed the above described cemetery lot to the Hoquiam Community Mausoleum Association by a bargain and sale deed containing the following restrictions:

"(1) The above premises conveyed shall be used only for the interment of the human dead of the Caucasian race, and all interments shall take place in the mausoleum building now erected on the premises in the crypts provided in said building. No interment shall take place in any portion of the ground surrounding the building.

"(2) No sale or transfer of a crypt shall be made while it contains the remains of any person.

"(3) The grantee herein shall make no conveyance or transfer of any right, title or interest which is conveyed by this deed, except by certificate of interment in form like the certificate attached to this deed, marked 'Exhibit A,' and made a part of this instrument.

"(4) The government, control and enjoyment of the mausoleum building and the grounds surrounding it, and herewith conveyed, shall be subject to such rules and regulations as the grantee from time to time may promulgate and enforce."

Respondent, at all times during the progress of work on the mausoleum, ignored demands for partial payments on his subscription. The building was completed about April 10, 1914, and, on demand for payment of his subscription, respondent notified appellant that he definitely and positively declined to pay any sum whatsoever. On January 7, 1915, appellant made tender to respondent of the certificate of the Hoquiam Community Mausoleum Association above set out, which respondent refused to accept; whereupon action was at once instituted on his subscription contract.

After appellant had shown the facts detailed above and had rested his case, respondent moved for a nonsuit. This was granted by the court. Judgment dismissing the action was subsequently entered, based on an order reciting that "the testimony introduced by the plaintiff was insufficient to sustain a verdict and judgment for the plaintiff."

It will be observed from the dates of the instruments set out that the certificate offered respondent is by an association which had no title to the premises at the time the certificate is dated. The evidence shows, furthermore, that this as-

sociation was not incorporated until May 7, 1914, nearly a month subsequent to the date of the certificate; in fact the record title to the lot on which the mausoleum stands was not at that time in the appellant. It will thus be seen the appellant, in tendering the certificate, was tendering an instrument purporting to be executed by another corporation, which acquired title by mesne conveyances some two months subsequent to the date of the certificate, and that it was an instrument entirely outside the existing chain of title at the time of its execution. It is true that, at the date of tender, January 7, 1915, title in the maker of the certificate had been perfected, but the fact remains that the instrument was executed at a time when the corporation had no capacity to make it, and it was not even tested by affixing the corporate seal. The appellant's contract provided that there should be "constructed and deeded to me, free of all incumbrances" the crypt subscribed for. We think that, under such contract, he was entitled to a deed capable of being recorded so as to show his interest through a regular chain of title. Whether or not he would have any more rights under a deed than under a certificate is immaterial. His contract called for a deed. We are satisfied that the tender was inadequate in the light of either of the reasons above assigned.

If it should be conceded that the tender of the certificate was sufficient, it would yet be vulnerable to the objection that the tender was not kept good by being brought into court. Otherwise appellant might recover on the subscription contract without transferring the crypt, and thus stand in the position of retaining both the property and its purchase price.

The appellant earnestly contends that the certificate is equivalent to a deed, that no greater right would pass to respondent under a deed than under a certificate. The weight of authority seems to sustain that contention. The rule is stated in *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769, as follows:

"It is settled law that a formal deed is not essential to confer the exclusive right to the use of a lot in a cemetery on the purchaser for burial purposes; and, on the other hand, if the lot be conveyed by deed absolute in form, such purchaser only acquires the right or privilege of using the lot for the purpose to which it is dedicated."

But conceding the correctness of the rule, it is not applicable here. The certificate tendered was void in its inception, and no valid tender of a good certificate was made at the time of trial.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13220. Department One. June 21, 1916.]

PENINSULA NATIONAL BANK, *Respondent*, v. PEDERSON CONSTRUCTION COMPANY, *Appellant*.[1]

BILLS AND NOTES—CHECKS. A check imposes no obligation on the drawee to pay, but is an implied promise by the drawer to pay in case it is not accepted.

SAME — "CHECKS" — WHAT CONSTITUTES. A time check of the amount due a laborer on construction work, made "payable at" a certain bank, constitutes a negotiable "check", under the negotiable instrument law, Rem. & Bal. Code, § 3392, providing that an instrument to be negotiable must contain an unconditional promise to pay; Id., § 3394, providing that a promise to pay is unconditional though coupled with a statement of the transaction which gives rise to the instrument; and Id., § 3477, providing that the use in a check of the words "payable at" a bank, is equivalent to an order on the bank to pay the amount called for.

BILLS AND NOTES — CHECKS — PRESENTMENT — REASONABLE TIME. Under Rem. & Bal. Code, § 3576, providing that a check must be presented for payment within a reasonable time, a delay of one week in presenting a check capable of presentment in two days was so unreasonable as to relieve the drawer from liability for its nonpayment by reason of the suspension of the bank.

FULLERTON, J., dissents.

[1]Reported in 158 Pac. 246.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 7, 1915, upon findings in favor of the plaintiff, after a trial before the court upon an agreed statement of facts, in an action to recover upon a check. Reversed.

John W. Roberts and *George L. Spirk*, for appellant.

Morris B. Sachs, for respondent.

Morris, C. J.—Action upon agreed facts. Prior to September 17, 1914, S. W. Bugbee was employed by the appellant company as a teamster in some construction work in Pacific and Lewis counties. Upon that day, there was delivered to him a voucher check reading as follows:

Hans Pederson Construction Co. No. 794
Seattle, Washington.

Contract at Doty, Washington. Date 9-17, 1914.

This certifies that S. W. Bugbee pay roll account No. 399 has worked as Teaming at 3, from 8-20, 1914, to 9-31, 1914. Total ..... days and 914 hours, at the rate of 60c per hr.

Amount		$548 40
Deductions—		
Board	$7 00	
Commissary	60	
Hospital		
Miscellaneous		
Cash on account	310 67	
Total deductions		318 27
Due		$230 13

Camp No. 3,
Doty, Wash.
Payable at

Raymond Trust Co., Bankers,
Raymond, Washington.

for Two Hundred and Thirty and 13-100 Dollars. (Not valid over One Hundred and Fifty Dollars.)

S. W. Bugbee, Employee — J. H. Barnes, Superintendent

J. W. Penfield, Timekeeper

This time check must be presented at once.

No question is raised as to the limitation named in the check and that feature may be disregarded.

Bugbee took this check to St. Johns, Oregon, a suburb of Portland, and on September 21, cashed it at the respondent bank. Respondent indorsed the instrument to the First National Bank of Portland on the same day, and on the next day the Portland bank indorsed it and sent it for collection to the National Bank of Commerce, at Seattle. On September 23, the National Bank of Commerce indorsed it and sent it to its correspondent bank at Raymond, Washington. On September 24, an endeavor was made to present it for payment, but the Raymond Trust Company had, on September 23, closed its doors and suspended business, having at the time on deposit to the credit of appellant a sum in excess of $3,000. For sometime prior to this, the Raymond Trust Company had been in the habit of cashing similar checks of appellant when presented, and had, in the course of such business, cashed similar ones for Bugbee. On the same day Bugbee received the check in question, he also received from appellant a check identical, except as to amount, which was indorsed by him and deposited with the First National Bank of Portland on September 19. This check was sent by the Portland bank to Raymond, and was paid on the 21st. It is admitted that, had the check in question been presented prior to the failure of the trust company, it would also have been paid.

From the language of the trial judge in deciding the case below, it is apparent that he was of the opinion that, because of the use of the words "payable *at* Raymond Trust Company," there was no legal obligation on the part of the trust company to pay the sum named in the instrument. It is not essential that such an obligation should be created in order to make the instrument a check. The giving of a check is not the creation of an obligation, but is merely the admission by the drawer of the existence of an obligation to pay a certain sum of money. It imposes no obligation on the drawee to

pay the same as between the drawee and payee. It is nothing more than a representation by the drawer that he has money on deposit with the drawee subject to his order, with an implied promise on the part of the drawer to pay the amount of the check in case it is not paid or accepted by the bank on which it is drawn. 1 Words & Phrases (2d Series), 661, and cases there cited.

The findings are further to the effect that an account was stated between Bugbee and appellant in the sum of $230.13, which appellant promised to pay, and that respondent became the owner of this account through assignment from Bugbee.

Section 3392, Rem. & Bal. Code (P. C. 357 § 1), provides that an instrument to be negotiable must contain an unconditional promise to pay. Section 3394 (P. C. 357 § 5), provides that the promise to pay is unconditional though coupled with "a statement of the transaction which gives rise to the instrument." Section 3477 provides:

"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

It is clear to us that this instrument is a check. The addition of a statement of the transaction out of which the indebtedness arose destroys neither its character as a check nor its negotiability. Under § 3477 (P. C. 357 § 173), the use of the words "payable at" is equivalent to an order on a bank to pay the amount called for. The instrument being then an unconditional promise in writing to pay a sum certain by one person to another, signed by the person giving it, and made payable at a particular bank, meets every requirement of a negotiable check as contained in our negotiable instruments law.

Section 3576 (P. C. 357 § 371), provides that a check must be presented for payment within a reasonable time after it is issued or the drawer will be discharged from liability. Bugbee retained this check from the 17th to the 21st of Sep-

tember, when it was cashed by respondent. It was not presented at the bank where made payable until the 24th. Under the stipulation, had it been presented to the bank at any time prior to its closing on September 23, it would have been paid. This delay was unreasonable and respondent must bear the loss. It does not require from the 17th to the 24th of any given month for the holder of a check residing at Portland, Oregon, to present the same for payment at Raymond, Washington. This is evident from the fact that the check deposited with the National Bank of Portland on September 19 reached Raymond and was paid on the 21st. No transfer or series of transfers can prolong the risk of the drawer beyond a reasonable time. What would be a reasonable time is not necessary to determine, further than to say that the time taken in presenting this check was not a reasonable time. Daniel, Negotiable Instruments (6th ed.), §§ 1590, 1592 and 1595.

The judgment is reversed, with instructions to enter judgment for appellant.

MOUNT, CHADWICK, and ELLIS, JJ., concur.

FULLERTON, J. (dissenting)—In my opinion, the instrument set forth by the majority is in no sense a check within the meaning of the negotiable instruments act. Had it so been, I think the court is in error in deciding that it was not presented in time.

[No. 13271. Department Two. June 21, 1916.]

ANDREW McCANN AND WILLIAM McCANN, *by his Guardian etc., Respondents*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY *et al.*, *Appellants*.[1]

RAILROADS—FIRES—NEGLIGENCE — EVIDENCE — QUESTION FOR JURY. In an action for damages for fire negligently communicated, a question for the jury was presented, though no testimony as to eyewitnesses of actual communication, where there was evidence of a fire on defendants' land, one arising on plaintiffs' land a few hours later, a strong wind from the former in the direction of the latter, and continuous scars of devastation between the two places, even though there was a possibility of communication from independent fires in the neighborhood.

RAILROADS—FIRES—INSTRUCTIONS. In an action for negligently communicating fire to plaintiffs' timber, a requested instruction for the jury to find for defendants, if they should find that plaintiffs' timber caught fire from other fires and was certain to be burned, though the two fires might have mingled before they reached plaintiffs' land, was properly refused, where the jury were instructed to take into account the other fires, and that the burden was on plaintiffs to trace defendants' fire to their own premises and show that their fire was caused by defendants' particular fire and none other.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. In an action for negligently communicating fire from defendants' to plaintiffs' premises, the admission of evidence that, just before the fire, the defendants took out burning permits, which were soon after revoked, was harmless, where it was in evidence that defendants did at the time start a fire on their lands.

EVIDENCE—RES GESTAE—ADMISSIBILITY. In an action against defendants for negligently communicating fire to plaintiffs' premises, evidence that simultaneously with the fire, one of the defendants stated: "I have got an awful fire—the fire got away from me," was admissible as part of the *res gestae*, whether or not defendant or his men had caused the fire, and whether or not they had tried to put it out.

Appeal from a judgment of the superior court for King county, Irwin, J., entered June 2, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property destroyed by fire. Affirmed.

[1]Reported in 158 Pac. 243.

Geo. W. Korte and *R. C. Saunders*, for appellants.

Alexander & Bundy and *Kerr & McCord*, for respondents.

BAUSMAN, J.—This is an action for damages to timber by fire negligently communicated from the premises of defendant railway company. A verdict for plaintiffs is complained of as contrary to the clear weight of the testimony, as influenced by erroneous instruction, and as founded on improper evidence.

That the fire could have come from other fires than the one started by defendants is possible, but in spite of an exceptionally lucid presentation of the evidence by appellants, we deem the lower court correct in not granting a new trial and setting aside the conclusions of the jury. The evidence is so voluminous that, except at great length, it would be to little purpose to analyze it here. It is sufficient to say that plaintiffs were entitled to go to the jury under *North Bend Lumber Co. v. Chicago, Milwaukee & P. S. R. Co.*, 76 Wash. 232, 135 Pac. 1017; *Northwestern Mut. Fire Ass'n v. Northern Pac. R. Co.*, 68 Wash. 292, 123 Pac. 468, Ann. Cas. 1913 E. 968, and *Asplund v. Great Northern R. Co.*, 63 Wash. 164, 114 Pac. 1043.

It is not necessary for plaintiff in these cases to produce eye witnesses of actual communication. It is enough that the fire on his land follow speedily, be traced with reasonable definiteness, and be due to defendants' fire and not to others. Far exceeding the insufficient proof in *Larsen v. Standard R. & Timber Co.*, 89 Wash. 447, 154 Pac. 790, plaintiffs show a fire on defendants' land early in the afternoon, one arising on their own land a few hours later, a strong wind from the former in the direction of the latter, and continuous scars of devastation, both directly and indirectly, between the two places. That the other fires might have come into this train of consequence is possible from the testimony, but just as possible that they did not. Here, then, was the province

of the jury. *Wick v. Tacoma Eastern R. Co.*, 40 Wash. 408, 82 Pac. 711.

The jury, we are satisfied, was properly instructed. Passing some minor complaints on this head, we may answer appellants' grievance in the lower court's rejecting a requested instruction that, if the jury should find plaintiffs' timber to have caught fire from the other fires and certain to be burned, though the two fires might have mingled before they reached plaintiffs' land, they must find for defendants. Now the instruction that the court did give was that the jury must take into account those other fires, and that plaintiffs could not recover if their loss was "because of the communication of such fires to it;" moreover, that the burden was on plaintiffs to trace defendants' fire to their own premises and to show that their fire "was caused by this particular fire *and none other*." This instruction we pronounce sufficient, and nothing in the *North Bend* case, *supra*, is to be construed as requiring more.

As to the evidence, it is complained that proof was wrongfully admitted that defendants, just before this fire, took out burning permits which were soon after revoked. This, we think, was relevant to show an intention to start the fire. But if it be not strictly relevant, it is harmless, since that defendants did at this time start a fire on their lands is conceded.

Next, it is said the court should not have permitted the statement of defendant Carlson to be quoted. What he is related to have said was, "Help me to get men. I have got an awful fire—the fire got away from me." These utterances, simultaneous with the fire, were clearly part of the *res gestae*, no matter whether Carlson or his men had or had not caused the fire, or whether he or his men had or had not tried to put it out.

Plaintiff McCann was permitted to give estimates of damage of timber without basing them on an inspection immediately before or immediately after the fire. Examining his

estimates and his explanation of them, we are satisfied that he sufficiently based his calculations for intelligent review by the court and jury.

We find a number of other points in appellants' assignments of error. They are, however, little pressed and, upon examination, we find them without merit.

Judgment affirmed.

MORRIS, C. J., MAIN, PARKER, and HOLCOMB, JJ., concur.

[No. 13027. Department One. June 23, 1916.]

RUTH K. TAYLOR *et al.*, *Appellants*, v. THE CITY OF SPOKANE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—CLAIMS—TIME FOR PRESENTATION—DEFECTS IN STREETS—"EXISTENCE" OF SNOW AND ICE. The Spokane city charter, art. 12, § 115, providing a ten-day limitation for filing notice of claims for personal injuries caused by the "existence of snow or ice" upon a sidewalk has no application to injuries sustained through the active negligence of the city in accumulating ice and large obstructing cinders on the sidewalk in washing its fire wagon.

SAME—DEFECTS IN STREETS—GOVERNMENTAL AGENCY—NOTICE. A city's exemption from liability for the negligence of its fire department as one of its governmental agents does not extend to injuries sustained through the negligent condition of a sidewalk, of which the city had constructive notice; since the negligence of the governmental agent then becomes the negligence of the city.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 7, 1915, upon granting a nonsuit, dismissing an action for personal injuries sustained in a fall upon a sidewalk. Reversed.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for appellants.

H. M. Stephens, *Ernest E. Sargeant*, and *Dale D. Drain*, for respondent.

[1]Reported in 158 Pac. 478.

CHADWICK, J.—This is an action to recover for personal injuries. Appellant alleges in her complaint, that while passing along the north side of Gordon avenue, in the city of Spokane, she was thrown violently to the sidewalk, sustaining most painful injuries; that the sidewalk was alongside of a fire station; that it was the custom of the firemen to wash the fire apparatus on the sidewalk, and in freezing weather, so that ice was formed, upon which the firemen were accustomed to throw ashes and cinders of all sizes; that she was injured on the 3d day of February, 1914, but that she was unable to transact or direct or arrange any of her business affairs until March 2, 1914, when she gave the notice required by the city ordinance.

The court below sustained a challenge to the sufficiency of the evidence because notice of plaintiffs' claim had not been filed within ten days after the accident.

The city charter (art. 12, § 115) provides:

"All persons having claims for damages for personal injuries or for injuries to property sustained by reason of alleged negligence or any act of the city, or any officer, agent, servant or employee of the city, must present such claims to the council within thirty days after such injury or damage. They must be in writing and verified, and must state the time when and the place where such injury was received or happened, the cause nature and extent thereof, the amount of damage sustained, the amount for which the claimant will settle, a statement of the actual residence of the claimant by street and number at the date of presenting and filing the claim, and the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.

"If an injury is alleged to have been caused by the existence of snow or ice on a street, highway, . . . crosswalk or other public place, or by reason of any such place being out of repair, unsafe, dangerous or obstructed from any cause or in any manner, the claim for any such alleged damage or injury must be filed with the clerk within ten days after the date of said injury or damage, and must state the

nature and location of the place where said alleged accident occurred.

"If the claimant is physically or mentally unable to present such claim within the time aforesaid, it may be presented and filed by some one on his behalf.

"Failure to present such claim in writing, duly verified in the form, manner and time aforesaid, shall bar any action against the city for such alleged damage or injury."

If the accident occurred in consequence of the existence of ice and snow, the claim was not filed in time. If not, it was filed within the thirty days, and is, therefore, in time.

Without discussing the many cases cited and relied on by the parties, and coming at once to the real issue, we are not inclined to hold that the ten-day limit applies under the facts of this case. The reason for that clause or proviso in the charter is so obviously apparent, and the consequence of its application—that is to deprive a party of a right of action—is so severe, that it should not be held to apply where the reason of the rule fails. It was so provided that the city might be informed of and take account of temporary and transient conditions.

"The manifest purpose of the charter was to afford the city an early opportunity to examine the locality where the accident occurred, to ascertain the nature of the alleged defect in the street or sidewalk, and learn, as far as known, the character and extent of the injuries sustained by the claimant, so that it may avoid litigation and costs by settling the claim, if meritorious; or, on the other hand, if on investigation the claim appeared to be without merit, then to afford the city an opportunity for preparing its defense and procuring evidence while the same may be obtained." *Pierce v. Spokane*, 59 Wash. 615, 110 Pac. 537.

Its purpose in fixing a ten-day limit for filing claims was to cover cases of passive negligence. The negligence alleged in the instant case was active and of long duration as to the unnatural formation of the ice, and the cinders which were placed thereon. The proofs show that it had been the custom of the city's agents to wash the fire wagon at the

point in question and to throw large cinders upon the ice. It was testified that the wagons were washed after each fire; that there had been ice at the point in question off and on all winter; that it had been the practice to throw cinders on the sidewalk; that the cinders were not sifted, and large chunks were used which were broken up somewhat with a shovel; that the sidewalk was so covered with ice and cinders on the day of the accident.

The accumulation of ice as the result of the acts of the firemen and the obstructing cinders—if the jury should find that they were obstructions as is alleged—bring the case within the authority of *City of Muncie v. Hey*, 164 Ind. 570, 74 N. E. 250. Admitting that the city was not liable for the mere accumulation of ice and snow upon the sidewalk, the court there held that an inquiry into the collateral circumstances was still open. The city had negligently permitted a water spout to discharge upon a much used sidewalk on one of the principal streets of the city. An accumulation of ice had formed, making a dangerous obstruction which had continued for about five days. The court said:

"The accumulation of water and ice in the manner shown in this case, so as to obstruct the free and safe use of the sidewalk, constituted a nuisance which it was the duty of the city to prevent or abate, and if it negligently failed to perform this duty, as charged, it ought to be and will be held liable for the natural consequences."

The doctrine of concurring cause is recognized in *Smith v. Tacoma*, 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018. The court there granted that a city might not be liable for an accident occurring from the mere presence of ice and snow, but found, "if other elements of actionable negligence exist, liability may arise." The facts of that case are available and will not be repeated here. See, also, *Snickles v. St. Joseph*, 139 Mo. App. 187, 122 S. W. 1122; *Smith v. Yankton*, 23 S. D. 352, 121 N. W. 848; *Lehmann*

v. Brooklyn, 30 App. Div. 305, 51 N. Y. Supp. 524; McQuillin, Municipal Corporations, § 2845.

The city being charged with negligence sufficient to sustain a cause of action independent of the mere presence of ice and snow, and for which it may be liable, it follows that the thirty-day limit for the presentation of claims is the controlling clause of the charter provision.

Although broad in its terms, we feel that the proper construction was placed upon the charter in *Connolly v. Spokane*, 70 Wash. 160, 126 Pac. 407, where, although the facts were different, the underlying principle was the same. The court said:

"If we assume, for the purpose of this case, that a ten-days' limitation is reasonable as applied to the conditions stated in the charter, it is plain that such provision should not be construed to apply to cases which do not clearly fall within the terms expressed, or be applied to cases where a doubt of the application exists; for to apply the provision to cases not clearly within the ten-days' provision would make it a snare and a trap, and therefore unfair and unreasonable. The first part of this section of the charter provides that claims for personal injuries sustained by reason of the alleged negligence of the city may be presented within thirty days. The latter part of the section provides that, if any injury is alleged to have been caused by the existence of snow or ice on any street, etc., or by reason of such place being out of repair the claim must be filed within ten days. This latter provision refers to the temporary and quickly changing conditions of the places named, while the former provision refers to a continuous negligence which might have been foreseen."

Respondent contends that, granting there was a negligent condition, it was due to the acts of the employees of the fire department, and, under the doctrine of governmental agency, the city would be relieved, citing *Cunningham v. Seattle*, 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629. We may refer to the decision cited for an answer to the argument advanced:

"The rule exempting municipalities from liability for negligence in the matter of governmental functions has one well recognized exception—that in regard to injuries sustained upon sidewalks, streets and public places."

The difficulty seems to be in not keeping in mind the rule that, when the negligent condition exists for a period of time which will hold the municipality to constructive notice, the negligence of the private individual or governmental agent, as in the case at bar, becomes that of the municipality.

Reversed, and remanded with instructions to proceed with the trial.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 13159. Department One. June 23, 1916.]

R. W. HILL, *Appellant*, v. ADA M. CALKINS *et al.*, *Respondents*.[1]

TAXATION—SALES—REMEDIES OF OWNER—ATTACK ON VOID SALES—TENDER. In replevin by a vendee to recover property conditionally sold, in which the defense was that the property had been sold for taxes alleged to be a valid lien, plaintiff's reply that the property was distrained and sold for the taxes of another who was never the owner of the property, is not an attack upon the validity of a tax, and so is not within Rem. & Bal. Code, §§ 955, 956, making tender of the tax justly due a condition precedent to an action to recover property sold for taxes.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 9, 1915, upon granting a nonsuit, in an action of replevin, tried to the court and a jury. Reversed.

H. W. Lueders, for appellant.

J. W. A. Nichols, for respondents.

FULLERTON, J.—In May, 1913, one Daisy L. Aldrich opened up rooming apartments in the city of Tacoma, par-

[1]Reported in 158 Pac. 347.

tially furnishing them at the time, and adding furniture thereto during the next four months as her necessities required. On September 3, 1913, she made a conditional bill of sale of the furniture to the respondent Ada M. Calkins. The contract of sale was in writing, and provided for monthly payments on the purchase price, made time the essence of the contract, and authorized the vendor to take possession of the property in case of default. The first installment on the contract, due September 21, 1913, was paid, but no other of the installments. On November 5, 1913, the sheriff of Pierce county distrained the property for a personal property tax levied against one Byron L. Aldrich and the Hawley Hotel, for the years 1912 and 1913, and on November 29, 1913, sold the property to the respondent A. H. Garretson, giving him a bill of sale therefor. Subsequently, A. H. Garretson transferred his interest to his co-respondent, Ada M. Calkins, and she, claiming ownership of the furniture thereunder, refused to make further payments in accordance with the contract under which she purchased the property from Daisy L. Aldrich.

The appellant, R. W. Hill, is the assignee of Daisy L. Aldrich, and instituted this action under the statutes of claim and delivery to recover the property because of the breach of the terms of the contract of conditional sale. His complaint set up the conditional contract of sale and the breach thereof, alleged that the property had not been taken for any tax, assessment or fine pursuant to statute, or seized under any execution levied against the property, and was otherwise sufficient in form to state a cause of action. The respondents answered separately, denying the principal allegations of the complaint, and pleading affirmatively the distraint and sale of the property by the sheriff for taxes, averring that the taxes were a valid and existing lien on the property in virtue of the assessments against Byron L. Aldrich and the Hawley Hotel. For reply the appellant put in issue the affirmative allegations of the answer, and set up

that the property was never the property of Byron L. Aldrich or the Hawley Hotel, nor subject to any lien for taxes assessed against them or either of them, and that it was not taken for any tax levied against Daisy L. Aldrich or the appellant Hill.

At the trial, which was had before a jury, there was evidence introduced tending to prove the affirmative allegations of the complaint and the reply. The court, however, on motion of the respondents made at the close of the appellant's case, nonsuited the appellant and dismissed the action on the ground that the action was one to recover property sold for taxes, and that the appellant had neither set forth nor proven the tax that was justly due on the property, or alleged that the tax for which the property was sold was illegal.

In its ruling we think the court was in error. The appellant did not question the validity of the tax under which the property was sold, but contended, and offered proofs tending to show, that the property was never the property of Byron L. Aldrich or the Hawley Hotel, nor subject to distraint and sale for taxes assessed against them, or either of them. In brief, his contention was that his property was distrained and sold for another person's taxes. Such being the claim, he did not have to attack the validity of the tax or tender its payment as a condition precedent to a recovery against the purchaser at the tax sale. He could sue the purchaser directly as for a wrongful taking, and when the tax sale was relied upon to defeat recovery, allege and show that the property was not subject to the lien of the tax or to distraint thereunder. The statute on which the court rested its judgment (Rem. & Bal. Code, §§ 955, 956; P. C. 501 §§ 373, 375) has no application to such a proceeding.

The judgment is reversed, and the cause remanded for a new trial.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13276. Department Two. June 23, 1916.]

NORMAN E. GEORGE *et al.*, *Respondents*, v. CARSTENS PACKING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. Whether a departure from his usual course, by the driver of an auto delivery truck, was within or without the course of his employment, so as to make his employer liable for his negligence, is a question for the jury, where, in making a night delivery out of the city, he was accompanied by a co-servant, as was frequently done without special directions, and on returning, he went out of his way a short distance to take him home; since the act bore such close relationship to his duties and the departure was not so marked that reasonable minds could not arrive at but one conclusion.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered July 31, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for injuries resulting from an automobile collision. Affirmed.

T. M. Vance, for appellant.

Troy & Sturdevant, for respondents.

PARKER, J.—The plaintiffs, George and wife, seek recovery for personal injuries, and also injuries to their automobile, which they claim resulted from the negligent operation of an automobile delivery wagon of the defendant, Carstens Packing Company, while in charge of one of its employees. Trial in the superior court sitting with a jury resulted in verdict and judgment in favor of the plaintiffs for the sum of $900, from which the defendant has appealed to this court.

There seems to be almost no dispute as to the detail facts, though as we proceed we think it will appear that there is ample room for honest difference of opinion as to the ultimate fact as to whether or not appellant's employee in charge

[1]Reported in 158 Pac. 529.

of its automobile was, at the time respondents were injured, acting within the scope of his employment so as to render appellant liable, which is the only question of serious moment here.

At the time in question, appellant owned and operated a market at the corner of Fourth and Washington streets, in the city of Olympia. Its automobile delivery wagons were kept at the Knox garage, at the corner of Third and Franklin streets, being one block east and north of the market. Appellant's employees having charge of its automobile delivery wagons were required to take and leave them at the Knox garage upon finishing the deliveries of each day. Fourth street runs east and west, Third street being parallel therewith and the next one to the north. One of appellant's customers was the Fir Tree Lumber Company, having its place of business some twelve miles southeast of the city, to whom appellant made deliveries of goods once or twice a week in the evenings after business hours at the market.

About six o'clock of the evening of October 22, 1914, one Husk, appellant's employee, in accordance with the usual custom and under instruction from his superiors, started with one of appellant's automobile delivery wagons to make delivery of goods to the Fir Tree Lumber Company. One Shahan, another employee of appellant, went along with Husk, evidently without being specially directed so to do, but merely for a ride and to keep Husk company. It was already dark when they started. They left and returned to the city by way of Main street, running directly south. Upon their return after a few hours' absence from the city, they stopped for a moment at the stable of appellant, situated on the alley next south of Fourth street about half a block distant from the rear of the market. Husk concluded that, while taking the automobile to the Knox garage, he would take Shahan to his home near Fourth street, some eight blocks east of the market. Mentioning this fact to Shahan, the latter mildly protested, or rather suggested that it might

not be the proper thing to do. However, Husk concluded it would be all right to do so, so far as his duty as an employee of appellant was concerned. They then proceeded east on Fourth street, passing Franklin street, on which the Knox garage is located one block to the north. Arriving at Shahan's home, he was left there, and Husk, returning west on Fourth street, came into collision with respondents' automobile, inflicting the injuries for which they seek recovery. This occurred on Fourth street several blocks east of Franklin street, at which point Husk would ordinarily have turned off Fourth street to the Knox garage one block north.

It was one of the rules of appellant, known to all of its employees, that they were not permitted to use the automobile delivery wagons for any purpose personal to themselves or other than in the business of appellant. It was not, however, against the rules of appellant for the employee making deliveries to the Fir Tree Lumber Company at night to take with him another employee. Indeed, this seems to have been frequently done, and apparently with the knowledge of appellant's manager. It is readily conceivable that the taking of another employee along, in view of the distance from the city and such delivery being made in the nighttime, might be desirable in the interest of appellant, though it was permissible only and not required as a part of any employee's duty.

Counsel for appellant contends that Husk was acting independent of, and outside of, the scope of his employment in the taking of Shahan to his home, and would be so outside the scope of his employment until he returned to the Knox garage, or at least until he returned to Franklin street, the point of departure from the ordinary route from the stable to the Knox garage, and that the trial court erred in declining to so rule as a matter of law, upon appellant's motions and request for instructed verdict. Counsel for respondents contend that, under all the circumstances shown, Husk was not acting outside the scope of his employment,

and that, in any event, if he was so acting from the time he left the stable until he left Shahan at his home, he, Husk, upon starting to return from Shahan's home, resumed his duty as appellant's employee, in that he was then taking the automobile delivery wagon in his charge to the Knox garage for appellant, it being argued that these questions were, in any event, questions of fact for the jury to decide.

The automobile delivery wagon being the property of appellant and, at the time of respondents' injuries, in charge of Husk, appellant's employee, and no contention being here made but that respondents' damage resulted from Husk's negligence, it is plain, under our decisions, that appellant is rendered liable, unless it be shown that Husk was at that time acting outside the scope of his employment. *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, 50 L. R. A. (N. S.) 59; *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181.

The trial court declined to decide the case as a matter of law in appellant's favor, but by its instructions, in effect, submitted to the jury the question of Husk having departed from the course of his employment in taking Shahan to his home, and also the question of Husk having resumed his employment and acting within the scope thereof upon leaving Shahan at his home and returning towards the garage for the purpose of leaving the automobile delivery wagon there, when respondents were injured upon Fourth street. The rule of law here controlling is plain. That is, that the master is liable for the negligence of his servant when committed in the execution of the master's business within the scope of his employment. But we have here presented, in its last analysis, really a question of fact—a question of fact, it is true, resting upon a number of detail facts which are practically uncontroverted, but nevertheless a question of fact, in that it is an ultimate fact to be determined from these minor facts,

as to which ultimate fact reasonable minds, we think, might honestly arrive at different conclusions. A problem much like that here presented was learnedly discussed by Judge Torrance, speaking for the court, in *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 38 Am. St. 361, 27 L. R. A. 161, touching the difficulties of the problem, as follows:

"In reality, however, the difficulty here spoken of arises in ascertaining whether the act was done in the execution of the master's business within the scope of his employment, which, as we shall see, is ordinarily a question of fact, and not in applying the rule when that fact has been ascertained. This fact once determined, the rule can be easily applied, but the rule cannot at all aid in the determination of the fact. The rule tells us that the master's liability depends upon whether the acts were done in the execution of his business within the scope of his employment, but it does not help us to determine whether they were or not so done.

"In like manner the general rule of construction is that the intent of the parties shall prevail. This tells us what to do when the intent has been ascertained, but affords no aid in a particular case in ascertaining what the intent is. Whether then the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment or not, must from the nature of things in most cases be a question of fact to be determined as such by the jury or other trier, because no general rule of law has been or probably can be laid down the application of which will determine the matter in all cases. Sometimes, however, this question is determined by the court as a matter of law. But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law.

"In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master's busi-

ness. So too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions.

"Thus, in *Phelon v. Stiles*, 43 Conn. 426, the deviation of the servant from the strict course of his duty was so slight that this court, as matter of law, held the master liable, while in *Stone v. Hills*, 45 Conn. 44, the deviation was so marked and unusual that it refused to hold the master responsible.

"On the other hand, where a servant, contrary to his duty, and solely for a purpose of his own, drove his master's horse and cart a quarter of a mile out of the way, the question whether in and while so doing he was in the execution of his master's business, within the scope of his employment, was left to the jury as a question of fact. *Whatman v. Pearson*, L. R. 3 Com. Pleas, 422. 'Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome.' Pollock on Torts, side p. 71. In the following cases, among many others, this question was decided as one of fact: *Kimball v. Cushman*, 103 Mass. 194; *Redding v. So. Car. R. R. Co.*, 3 So. Car. 1; *Rounds v. Del., Lack. & Western R. R. Co.*, 64 N. York 129; *Cormack v. Digby*, 9 Irish Rep. Com. Law Series, 557; *Burns v. Poulsom*, L. R. 8 Com. Pleas, 563."

So here, it seems to us that the question of Husk being within or without the scope of his employment, at the time respondents received their injuries, is not so plain under all the circumstances here shown that it can be decided as a matter of law. His departure from the usual route was comparatively slight. The taking of Shahan to his home this short distance away from the usual route, in view of the circumstances under which Shahan accompanied him on his night delivery trip and the time of their return, certainly brings this act of Husk in at least very close relationship with his duties as appellant's employee, and having in mind the burden of proof resting upon appellant in view of the ownership of the automobile delivery wagon, while in the pos-

session and control of Husk as appellant's employee, we are constrained to hold that the trial court correctly submitted the case to the jury. Our own decisions in *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040, and *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141, lend some support to this conclusion, though we do not cite those decisions as being exactly in point. See, also, *Barmore v. Vicksburg, S. & P. R. Co.*, 85 Miss. 426, 38 South. 210, 70 L. R. A. 627.

Counsel for appellant relies particularly upon our decision in *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216, and also the decision of the Maryland court of appeals in *Symington v. Sipes*, 121 Md. 313, 88 Atl. 134, 47 L. R. A. (N. S.) 662. The *Jones* case we think is not controlling, since it appears that defendant's chauffeur took the machine from the garage without defendant's knowledge or permission, using it exclusively on an errand personal to himself. In the *Symington* case, it is true the chauffeur originally had possession of the automobile in the course of his employment by the defendant, but his departure from the course of his employment and use of the machine, which was wholly foreign to his employment, covered several hours and many miles of travel, during which time he injured the plaintiff. In other words, in both of these cases the departure of the employee from the course of his employment was so marked that reasonable minds could arrive at no other conclusion than that there was a departure by the servant from the course of his employment.

We are constrained to hold that the learned trial court did not err in declining to take the case from the jury as requested by counsel for appellant, nor in submitting to the jury the questions we have discussed. One or two other errors are suggested, but we think they are wholly without merit and that the case does not require further discussion.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, BAUSMAN, and MAIN, JJ., concur.

[No. 13324. Department One. June 23, 1916.]

LUISA BRIGLIO *et al.*, *Respondents*, v. HOLT & JEFFERY, *Appellant*.[1]

EXPLOSIVES—BLASTING IN STREET—DEGREE OF CARE. Where blasting powder or dynamite is used in the prosecution of street work, the contractor is bound to use "every reasonable effort for the prevention of injury."

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $2,500 for permanent personal injuries in the loosening or misplacement of the sacroiliac joint will not be set aside as excessive, where the extent of the injuries depends upon opinion evidence, and it cannot be said that the verdict reflects passion and prejudice as a matter of law.

Cross-appeals from a judgment of the superior court for King county, Ronald, J., entered October 9, 1915, upon the verdict of a jury rendered in favor of the plaintiffs for $2,500, for personal injuries caused by blasting. Affirmed.

Preston & Thorgrimson, for appellant.

Andrew R. Black and *Ralph Simon*, for respondents.

CHADWICK, J.—We shall refer to the party Luisa Briglio as the respondent. The facts in this case are sufficiently stated in the opinion written on the former appeal (*Briglio v. Holt & Jeffery*, 85 Wash. 155, 147 Pac. 877), with the exception that, at the second trial, one of the physicians who had been familiar with the case testified that long association and continued observation warranted the belief that the injury which Mrs. Briglio had sustained was due to the loosening or misplacement of the sacroiliac joint.

It is assigned as error that the court charged the jury that appellant was bound to use "every reasonable effort for the prevention of injury." The instruction is substantially the same as that approved by the court in *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. 916. If the

[1]Reported in 158 Pac. 347.

instruction were otherwise subject to criticism, it would not be so in this case. Appellants were employing the force of blasting powder or dynamite in the prosecution of their work. The degree of care which the law puts upon them is commensurate with the danger to those who are within range of their operations. From this viewpoint, the instruction is sustained by the reasoning of the court in the case of *Freebury v. Chicago, M. & P. S. R. Co.*, 77 Wash. 464, 137 Pac. 1044.

At the former trial, the jury returned a verdict for the plaintiff in the sum of $2,000. It is alleged now, as it was on the former appeal, that the verdict is excessive, and while there is much evidence that lends support to the insistence of counsel that respondent Luisa Briglio is a malingerer and is shamming her hurts, there is testimony to sustain the finding of the jury that she is permanently injured and in greater degree than appeared at the former trial. While the court reduced the verdict after the former trial, it did not do so in this case. The extent of respondent's injury depends upon opinion evidence. The jury was free to believe it, and we cannot say that the verdict is large enough to warrant us in holding that it reflects passion and prejudice of the jury as a matter of law.

The court below allowed the costs of the former trial in the superior court and the costs of the former appeal in this court as an offset against the verdict, and entered a judgment in favor of respondent for the difference. Respondent has taken a cross-appeal, contending that, inasmuch as she prevailed finally, she is entitled to recover all costs heretofore expended in the action.

Appellant is entitled to its costs on the former appeal. This is covered by statute, Rem. & Bal. Code, § 1744 (P. C. 81 § 1241). We think, too, that it is entitled to recover its costs expended in the former trial. Costs follow as an incident to a judgment. The effect of our holding on the appeal was to vacate the former judgment and hold it for

naught. The only judgment in which respondent has any interest is the present judgment, which we affirm, and she is entitled only to such costs as are incident to that judgment.

MORRIS, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 13330. Department One. June 23, 1916.]

EDNA HAWLEY, *Respondent*, v. WARREN HAWLEY, *Appellant*.

HUSBAND AND WIFE—SEPARATE MAINTENANCE—ACTION—DIVORCE. In a wife's action for separate maintenance it is error to deny the husband's cross-complaint for a divorce, where it appears that the wife was guilty of a fault that had not been condoned and that entitled him to a divorce under the statute.

Appeal from a judgment of the superior court for King county, Jurey, J., entered August 12, 1915, upon findings in favor of the plaintiff, in an action for separate maintenance, tried to the court. Modified.

Bixby & Nightingale, for appellant.

Chas. Ethelbert Claypool, for respondent.

CHADWICK, J.—The parties to this action were married at Lynden, Whatcom county, Washington, July 5, 1905, and resided together in that vicinity until about October 1st, 1914, when, by an arrangement which seemed at the time to be mutually satisfactory, Mrs. Hawley took their two children, Dorothy and Lowell, and went to Seattle, where she has since resided, the appellant remaining at Lynden.

At the time of the separation, each took half of the community furniture, and a contract was entered into wherein is was agreed that the husband should pay to the wife $2,000—$60 to be paid at once, and monthly installments of

$30. This promise was evidenced by a promissory note. Appellant mortgaged some property owned in his separate right to secure this obligation and has since observed its terms. In May, 1915, respondent filed a complaint in the superior court of King county, praying for a decree of separate maintenance in the sum of $100 per month. Appellant answered and filed a cross-complaint setting up a cause of action for a divorce. The court, after a trial on the merits, made an order allowing respondent $50 a month for her separate maintenance and for the maintenance of the children. Appellant was denied a divorce.

Opinions in divorce cases reciting the history of domestic infelicity and marital infidelity are of no importance to the profession or to the world at large. They point no moral and are of no value as a precedent, for each venture upon the sea of matrimony is a voyage upon an uncharted sea. Each voyager follows in a way that no other ever followed before. None finds the same rocks and shoals or the same peaceful and open waters. It is enough, then, for the court to know the facts of each particular case and, in its judgment, endeavor to best serve the public by shielding the unfortunate parties from the aspersions of society, and the children, if any, from the hurt that comes from a public recital of the faults of their parents; faults which may follow them throughout their lives.

Without going into detail, then, we find that respondent was guilty of a fault which has not been condoned by appellant, and that he is entitled to a divorce under the statute. We sustain the separation agreement, and give the children to the present care and custody of the respondent, with the right reserved to appellant to visit his children freely and to entertain them in his home and among his own people at such times as the parties may agree upon.

We think, considering the financial situation of the appellant, that forty dollars a month is as much as he is now able to pay as maintenance, and the decree will be so modi-

fied. Each payment is to be credited upon the note until it is paid, and to continue thereafter without further order of the court, subject however, to the right of either party to petition the court for a modification upon a showing of altered conditions and circumstances.

Modified and remanded for the entry of a decree consistent with this opinion.

MORRIS, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 13439. Department One. June 23, 1916.]

FREDERICK S. EASTON, *Respondent*, v. MABEL GANS LITTOOY, *Appellant*.[1]

PRINCIPAL AND AGENT — APPARENT AUTHORITY — COLLECTION OF NOTES—PLACE OF PAYMENT—POSSESSION. Where mortgage coupon interest notes were made payable at the office of agents, it was the duty of the mortgagee to have the coupons there when due, and the mortgagor may assume that the agents are authorized to receive payment, although the coupons were not surrendered at the time of payment, where the agents had been in the habit of demanding and receiving such payments without having possession of the coupons.

SAME—AUTHORITY OF AGENT—RATIFICATION—ESTOPPEL. A mortgagee who failed to immediately repudiate the authority of agents who had been in the habit of receiving payment of interest coupons without possession of the coupons, upon notice that they had demanded and received a payment, but waited some time for remittance from them until they became bankrupt, is estopped to dispute the agency.

MORTGAGES—FORECLOSURE—PREMATURE ACTION—MATURITY OF DEBT. An action to foreclose a mortgage will not be dismissed as prematurely brought, where the mortgagor had given notice to accelerate maturity, tendering unpaid matured interest and principal, and the contest waged was as to whether the debt was paid by the several tenders which had been declined owing to a *bona fide* dispute as to the authority of agents to receive one of the payments.

MORTGAGES — DISCHARGE — TENDER. Although a tender by the mortgagor will discharge the lien, a court of equity will not declare a forfeiture of the lien where refusal of the tender was not unrea-

[1]Reported in 158 Pac. 531.

sonable on account of a *bona fide* controversy as to a payment made to an agent, and a discharge of the lien would work a discharge of the debt.

INTEREST—SUSPENSION—TENDER. Tender of the principal of a mortgage before suit, stops subsequent interest.

MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—TENDER OF DEBT. Attorney's fees cannot be allowed on the foreclosure of a mortgage where the suit was the result of the mortgagee's mistake in refusing a tender.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 15, 1916, in favor of the plaintiff, upon an agreed statement of facts, in an action to foreclose a mortgage. Modified.

T. W. Hammond, for appellant.

Chapman & Bailey, for respondent.

ELLIS, J.—Action to foreclose a mortgage for default in payment of interest. The sole defense was payment of the first coupon alleged to be in default and discharge of the others and of the principal note by tenders when due, wrongfully rejected. The cause was tried on stipulated facts. On September 1, 1908, one Mary M. Gans, mother of defendant, Mabel Gans Littooy, executed and delivered to one M. L. Bevis her note for $2,500, due January 1, 1918, with ten interest coupons attached, each, save the first, being for $175, and maturing, respectively, January 1 of each year after date. The note and coupons were by their terms payable with New York exchange at the office of Bevis Brothers, in Spokane, Washington. The note contained the usual provision for acceleration of maturity on default of interest, and also gave the maker the option of paying the principal on any interest date on and after January 1, 1914, on thirty days' notice. The mortgage was given to secure the note and interest and was soon after assigned to plaintiff, who resides at Lowville, New York, and who still holds it. The assignment was duly recorded. In March, 1910, Mrs. Gans,

by a deed of gift, conveyed the mortgaged premises to defendant, Mabel Gans Littooy, who still owns the property. The first coupon was paid by Mrs. Gans to Bevis Brothers, in response to a notice from them, prior to January 1, 1909, and the coupon was subsequently surrendered by them, Mrs. Littooy having knowledge of the facts at the time. On December 1, 1909, Bevis Brothers mailed to Mrs. Gans at Tacoma the following notice:

"The interest on your loan of $2,500 will mature January 1, 1910. The amount due at that time will be $175, which please remit to us promptly so that the eastern lender may receive it on the day it falls due. Be sure to send New York or Chicago draft, otherwise add 25 cents to cover cost of exchange. Interest at the rate of 10% will be charged on all delinquent payments. The coupon will be mailed to you as soon as it is received from the east. Please pay your taxes before they become delinquent. Bevis Brothers."

On receipt of this notice, Mrs. Gans showed it to Mrs. Littooy, and through her procured a New York draft for the $175 and mailed it to Bevis Brothers at Spokane. Later, with the knowledge of Mrs. Littooy, this coupon was also surrendered to Mrs. Gans by Bevis Brothers. On August 2, 1910, Mrs. Gans died, leaving a will devising the mortgaged property to Mrs. Littooy, who was appointed and qualified as executrix. Plaintiff never presented any claim against the estate, which has long since been settled. He now has no personal claim against any one for the amount of the debt. On December 1, 1910, Bevis Brothers mailed another notice addressed to Mary M. Gans at Tacoma, Washington, couched in similar terms to that above, save as to date, and requesting payment of the coupon maturing January 1, 1911. This notice was received by Mrs. Littooy, who, on December 15, 1910, remitted to Bevis Brothers at Spokane $175, New York exchange, and a few days later received their receipt for it. She has never received the coupon. On February 6, 1911, plaintiff wrote a letter addressed to Mrs.

Gans, which was in due course received by Mrs. Littooy, stating that he owned the notes and mortgage and demanding payment of this coupon. This conveyed the first actual knowledge to Mrs. Littooy of the fact that plaintiff held the note, coupons and mortgage and of his address. In response, both she and her attorney wrote to plaintiff advising him that she had sent the interest "to your agents Bevis Bros. of Spokane on December 15, 1910, by New York draft"; that she held their receipt for that amount; that she had received no notice to pay any other person, and had sent the money to Bevis Brothers, as she had the prior interest.

On April 14, 1911, plaintiff wrote to Mrs. Littooy's attorney stating that he had written to Bevis Brothers asking them to forward the money for the coupon, expressing the belief that he would soon receive it, and stating that, if not received within a reasonable time, he would so advise in order that Mrs. Littooy might proceed to compel Bevis Brothers either to return the money or send the coupon, also stating that plaintiff always kept coupons on loans until the drafts to pay them were received. Correspondence of the same tenor on both sides continued, and on August 8, 1911, plaintiff wrote to Mrs. Littooy for the first time repudiating her and her attorney's assumption that Bevis Brothers were his agents and asserting that he had never authorized them to collect for him any interest coupon. Meantime Bevis Brothers had been declared bankrupt. Thereafter, prior to the maturity of each of the coupons maturing January 1, 1912, and January 1, 1913, Mrs. Littooy, through her attorney, offered to pay them if sent to some designated place in the state of Washington. Each of these offers plaintiff refused unless she would pay, not only the current coupon, but that of 1911. On August 26, 1913, Mrs. Littooy, through her attorney, wrote to plaintiff demanding that he present to her the principal note for $2,500 through some bank or person in Tacoma or at any place of convenient access in the

state of Washington, in which event she would pay the note, together with interest thereon subsequent to January 1, 1913. Plaintiff replied, recognizing defendant's right to pay the principal debt on January 1, 1914, together with all accrued interest, and again stating that, if she would pay the coupons maturing respectively January 1, 1911, 1912, 1913 and 1914, as well as the principal, he would forward all these with a satisfaction of the mortgage to some bank at Tacoma where they could be paid. This she refused, and this suit followed. Defendant husband, disclaiming any interest, was dismissed. The trial resulted in a decree of foreclosure for the full amount claimed. Defendant appeals.

In response to the claim that the first coupon was paid by the remittance to Bevis Brothers, respondent invokes the general rule that one paying a note to a person assumed to be the agent of the owner is only protected by demanding and receiving the note, citing, *Dewing v. Crueger*, 7 Wash. 590, 35 Pac. 393, and *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257. But in each of those cases the money was paid to the alleged agent, not at the place where by its terms the note was payable, but with the express understanding that it was to be transmitted by the alleged agent to the designated place of payment. The distinction is plain. In the case here, it was as much the respondent's duty to have the coupons at their place of payment on their due date as it was appellant's duty to pay them at that place. No tacit understanding between respondent and Bevis Brothers that the latter would send the money to him before the coupons were forwarded could abrogate or change that duty. Appellant, knowing that the notes were payable at the office of Bevis Brothers in Spokane, and having received the notice from the person in charge of that office, and having paid other coupons for her mother to the same person at the same place in response to similar notice, subsequently receiving the coupon, was reasonably warranted in assuming that Bevis Brothers were authorized to receive the payment. True, as

said in the *Douglass* case: "It is familiar law that one dealing with an agent is bound to know his authority;" but it is equally familiar law that one dealing with a supposed agent may safely rely upon the apparent authority which the supposed principal knowingly and continuously permits the supposed agent, whatever his real authority, to assume. There can be no question that the appellant did in fact believe that Bevis Brothers were authorized to receive this money. The whole situation was one reasonably calculated to induce that belief. *Wolford v. Young*, 105 Iowa 512, 75 N. W. 349; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. 138. Had there been an immediate repudiation of the agency, appellant would have stood at least some chance of collecting the money paid from Bevis Brothers before their failure. There was no such repudiation until August 8, 1911. At that time there was no such chance. We think the facts estopped respondent from then denying the agency, which he did not expressly and unequivocally repudiate before.

Appellant claims that the action was prematurely brought, in that the coupons were not sent to this state, and in that respondent declined to accept payment, save on condition that the 1911 coupon be again paid. This might be true were it not for the fact that, prior to suit, appellant herself had given notice in exercise of her own option to accelerate maturity. Moreover, in connection with that notice, she disclaimed any intention of paying any back interest except that which had accrued since January 1, 1913. After that notice she could only claim that the action was prematurely brought by showing that she was then ready and willing to pay all the matured interest coupons subsequent to that paid to Bevis Brothers. The parties are now here, the one claiming that the debt has been paid by the several tenders; the other that neither principal nor interest since 1910 has been paid. The real contest is as to what, if anything, is due. The contest having been waged on that issue in the court below, and brought here for our determination, we decline to

treat it as academic and order dismissal of the action as premature.

Finally, it is urged that the conditions of the mortgage were fully satisfied and the lien discharged by the several tenders of interest and of the principal before suit. Appellant also asserts a continued readiness to pay, as excusing the failure to bring the money into court. Undoubtedly at common law, a mortgage being a conveyance with a defeasance, tender of the mortgage debt on law-day satisfies the condition and invokes the defeasance so as to discharge the property from the incumbrance. But the debt remains and its payment may be enforced by an action at law; this on the ground that it is only the incidental or accessorial things that are lost by rejection of tender, not the original debt or duty. *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145. Undoubtedly, also, where, as in this state, a mortgage is a mere lien, tender by the mortgagor at any time before suit has the same effect, nor is it necessary in either case that the tender be kept good by bringing the money into court. *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, 125 Am. St. 945, 15 L. R. A. (N. S.) 1164. This rule, though logical and well supported by authority, is a harsh one, penal in its nature, and the courts have shown no disposition to extend it. *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998. The principle should not be pressed beyond its strict limits. *Harris v. Jex*, 66 Barb. (N. Y.) 232. In order to discharge the lien of the mortgage, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary and unaccompanied by any *bona fide* though mistaken claim of right.

"But to produce such serious and heavy consequence the refusal must have been unqualified, and unaccompanied by any *bona fide* claim of right, which was supposed by the party to justify his refusal. The claim of right may have been one that could not be supported as matter of law; still, if it was believed in, and was not wantonly put forward as a cover to

a wrong purpose, it is sufficient to prevent the forfeiture of the security. So here, while it is clear enough that the complainant had no right to make it a condition of receiving payment, that the defendant should enter into stipulations about making repairs on the mortgaged property, still it may have been that it thought it had such right; and I do not find such evidence of its bad faith in this regard as to justify a declaration of forfeiture." *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286, 3 L. R. A. 90.

In such a case equity will treat a mistake of law as analogous to, if not identical with, a mistake of fact and relieve against forfeiture. *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458. There is no equity in seeking to avoid both lien and debt. *Waldron v. Murphy*, 40 Mich. 668; *Harris v. Jex, supra.* In the case here, it is manifest that respondent throughout entertained a *bona fide* belief that he was entitled to all he demanded. In holding that he was mistaken in this we have gone quite as far as the equities of the case will justify. The record discloses a long standing controversy touching a matter upon which there was reasonable ground for honest difference of opinion, which nothing short of an appeal to the courts could settle. It would be harsh and inequitable to visit upon respondent a forfeiture of his lien, when, as in this case, a discharge of the lien would be a discharge of the debt. We decline to do so.

Though respondent evidently believed that by accepting payment of subsequent coupons and of the principal he would prejudice his right to claim that the 1911 coupon had never been paid, we are satisfied that in this too he was mistaken. Regardless of the controversy touching that coupon, he was not justified in refusing to accept payment of the subsequent coupons and principal. It has always been held that the tender of the principal before suit, if wrongfully rejected, stops subsequent interest. We must give it that effect in this case. Respondent is entitled to his lien for the face of each of the past due coupons, saving the one paid to Bevis Brothers, and for the principal debt. He is not entitled to

interest on any of these coupons, nor upon the principal subsequent to January 1, 1914, nor is he entitled to an attorney's fee, since the foreclosure was the result of his own mistakes.

The cause is remanded with direction to modify the decree in accordance with this opinion. Appellant is entitled to her costs on this appeal.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 13463. Department Two. June 23, 1916.]

SIMPSON LOGGING COMPANY, *Respondent*, v. CHEHALIS COUNTY (NOW GRAYS HARBOR COUNTY), *Appellant*.[1]

TAXATION—ASSESSMENT—REVIEW—JUDGMENT — CONCLUSIVENESS—STATUTES. A judgment correcting an excessive valuation for an even numbered year and fixing the correct valuation, becomes the assessed valuation for the following year, and is final and binding upon the board of equalization, under Rem. & Bal. Code, § 9101, providing that the assessed valuation of real property for taxation in even numbered years shall remain the assessment in odd numbered years, where there are no changed conditions.

Appeal from a judgment of the superior court for Grays Harbor county, Frater, J., entered December 6, 1915, in favor of the plaintiff upon the pleadings, in an action for equitable relief, tried to the court. Affirmed.

J. E. Stewart, *O. M. Nelson*, and *A. Emerson Cross*, for appellant.

W. H. Abel, for respondent.

PARKER, J.—The plaintiff seeks reduction of taxes charged against certain of its timber lands in Grays Harbor county, formerly Chehalis county, for the year 1913, and having tendered to the county treasurer in payment of the taxes an amount which it contends is the full amount justly due there-

[1]Reported in 158 Pac. 342.

for, seeks a judgment requiring the county treasurer to accept the amount so tendered in full payment of the taxes upon its lands for that year. Judgment being rendered by the superior court in favor of the plaintiff as prayed for, the defendant has appealed to this court.

Judgment was rendered in favor of the logging company upon the pleadings, wherein admitted facts appear which we regard as controlling the respective rights of the parties, as follows: The logging company's lands being assessed in the spring of 1912, and conceiving itself to be aggrieved by the assessment so made, in February, 1913, it commenced an action in the superior court seeking a reduction of its taxes computed by the county officers upon that assessment, alleging as grounds therefor that the assessment was excessive, being arbitrarily and capriciously so made. That action resulted in judgment in favor of the logging company, rendered by the superior court in August, 1913, wherein the superior court found and recited in the judgment, among other things, the following:

"That the fair market value of said lands for purposes of taxation on March 1, 1912, was the amounts severally set opposite said described lands in column four, and that the amount of tax justly chargeable against said several described tracts of land for the year 1912, based on said fair valuation of both land and timber, was the amounts severally set opposite of said described lands in column five thereof."

The reference in this quotation is to a tabulated statement embodied in the judgment. This judgment was appealed from and affirmed by this court. *Simpson Logging Co. v. Chehalis County*, 80 Wash. 245, 141 Pac. 344. The taxes for the year 1912 were paid and satisfied accordingly. Real property not being assessed in odd numbered years (Rem. & Bal. Code, § 9101), there was no assessment of the logging company's lands in the year 1913, the taxes for which year are here in question. In listing the logging company's lands for the year 1913, the county officers adopted the same valu-

ation fixed by the assessment as made in the spring of 1912, which assessment was held by the judgment of the superior court above quoted from to be excessive, the county officers ignoring that judgment in listing the logging company's lands in 1913. In the fall of 1913, the logging company appeared before the county board of equalization and requested that the assessment of its lands be reduced upon the tax records for that year in accordance with the judgment of the superior court to the end that the taxes for that year be computed upon the true valuation of 1912 as determined by the judgment of the superior court. This the board refused to do, so the taxes of 1913 were computed upon the assessment made by the county officers in 1912, which the superior court had determined to be excessive, finding in its judgment the fair market value of the lands for the purpose of taxation in that year. No facts are pleaded showing that the county board of equalization changed the valuation of the logging company's lands from that fixed as the assessed valuation in 1912 because of the making of any improvements thereon, nor is it claimed that there is any such cause for change in the assessed valuation of the lands for the year 1913.

Section 9101, Rem. & Bal. Code, touching the assessment of real property in even numbered years and the grounds upon which such assessment may be increased or lowered in odd numbered years, reads as follows:

"All real property in this state subject to taxation shall be listed and assessed under the provisions of this chapter in the year nineteen hundred and biennially thereafter on every even numbered year, with reference to its value on the first day of March preceding the assessment. . . . Provided further, that real estate becoming subject to taxation since the last assessment, and improvements upon real estate made since the last assessment, shall be assessed and included in the assessment list and tax-roll in every odd-numbered year: And provided further, that the destruction or removal of improvements since the last preceding assessment shall be duly

noted by the county assessor, and the assessment and tax-rolls herein provided made to conform to such changes: Provided further, that all real estate subject to taxation shall be listed by the assessor in each year in the detailed and assessment list, and in each odd numbered year the valuation of each tract for taxation shall be the same as the valuation thereof as equalized by the county board of equalization in the preceding year."

The provisions of this section render it plain that the assessments of real property made in even numbered years remain the assessments of such property in odd numbered years, except when such assessments are changed for the causes specified in this section, with which causes we have nothing to do in this case. Therefore, whatever the correct assessed valuation of the logging company's lands may have been for the year 1912, that would be the assessed valuation of the lands for the year 1913. It would seem to follow as a matter of course that, when it is judicially determined that the correct assessed valuation of the logging company's lands for the year 1912 were certain amounts upon the respective tracts, those valuations necessarily became the assessed valuation of the lands for the year 1913. It therefore seems quite plain to us that the judgment of the superior court determining the assessed valuation of the logging company's lands for the year 1912 was in effect an adjudication of what the assessment of those lands would be for the year 1913 in the absence of changed conditions, to wit, the making, destruction or removal of improvements calling for a different valuation for the year 1913. No such changed conditions affecting the valuation of the logging company's lands appearing in this case, we conclude that it is entitled to pay and satisfy taxes chargeable against its lands upon the same basis, so far as assessed valuation is concerned, as for the year 1912.

Some contention is made that the trial court erred in rejecting the county's third amended answer. This answer,

which is in the record before us, does not plead any facts showing cause for change in the valuation of the logging company's lands in the year 1913 from the valuation as determined by the superior court for the year 1912, nor does it show any attempt on the part of the board of equalization to make such change. The facts pleaded therein amount to nothing more than an attempt to relitigate the matters determined by the judgment of the superior court fixing the assessed valuation of the logging company's lands for the year 1912. Clearly this is no defense, that judgment being final upon that question.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, BAUSMAN, and MAIN, JJ., concur.

[No. 13323. Department Two. June 24, 1916.]

ANTON TRONSRUD *et al.*, *Respondents*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*.[1]

TRESPASS—UPON TREES—TREBLE DAMAGES. Under Rem. & Bal. Code, § 939, allowing treble damages for wilful or wanton trespass upon trees "without lawful authority," and single damages if the act is "casual or involuntary," treble damages cannot be recovered for injuring ornamental trees which defendants were authorized to trim beyond menace to defendant's wires, although the authority was exceeded.

TRESPASS—DAMAGES—MEASURE. The measure of damages for injuring ornamental trees is the diminished value of the land and not the diminished value of the trees.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 6, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for trespass. Modified.

James B. Howe and *Hugh A. Tait*, for appellant.

James R. Gates, for respondents.

[1]Reported in 158 Pac. 348.

BAUSMAN, J.—Plaintiffs, under Rem. & Bal. Code, § 939 (P. C. 81 § 1551), sought treble damages from defendant for seriously injuring ornamental trees which they had authorized him to trim merely beyond menace to defendant's electric wires. That section itself multiplies the recovery only when the mischief is done "without lawful authority," besides which the next imposes that, if the act be "casual or involuntary," the damages shall be but single. Now it is undisputed that there was permission given for this thing, and though the jury did find that as to cutting the tops no permission had been given, the right to do some lopping and trimming is clear. Defendant may indeed have gone further in plaintiffs' absence than it would have done in their presence, but it would be misusing this law to visit upon the mistaken a penalty intended for the wanton. The bad faith or degree of wilfulness necessary to set in motion the first section is made clear in *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720; *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 Pac. 645, and *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615. In this case plaintiffs should have been confined to compensation under the second.

Appellant complains also of the measure of damages allowed plaintiffs, the diminished value of the land instead of the diminished value of the trees. The former was correct. This statute in terms applies to lawns and gardens as well as forests. It grants compensation both for timber carried off from the one and for defacement suffered or ornament lost to the other. To confine plaintiffs in these cases to what it will cost to reproduce a shrub or tree manifestly will not do. 38 Cyc. 1131; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442. The case accordingly cannot be reversed for error in this respect.

In trebling the damages, however, error did occur. The judgment is hereby modified and reduced to the actual dam-

ages, $178.75. Remanded accordingly with costs to appellant.

Morris, C. J., Parker, Main, and Holcomb, JJ., concur.

[No. 13468. Department One. June 26, 1916.]

Herring-Hall-Marvin Safe Company, *Appellant*, v. Purcell Safe Company, *Respondent*.[1]

Dismissal and Nonsuit—Grounds—Effect on Counterclaims. Judgment on appeal directing the dismissal of the action because of an agreement for arbitration of the dispute carries with it the dismissal of defendant's counterclaims, without prejudice; since the ground of the dismissal obviously went to the whole controversy.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 1, 1915, in favor of the defendant on remittitur from the supreme court dismissing consolidated actions for replevin and on an account stated. Affirmed.

George R. Biddle, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

Ellis, J.—This is an appeal by plaintiff from a judgment entered on the remittitur pursuant to our decision in a former appeal by the defendant in the same case. The original decision by Department One is reported in 81 Wash. 592, 142 Pac. 1153. Originally plaintiff brought two actions, the first in replevin, the second on account stated. The actions were consolidated and defendant answered, setting up a contract between the parties out of which the whole controversy arose, and pleading two counterclaims in large sums. The trial court found in favor of plaintiff on its complaints and against defendant on its counterclaims, and entered judgment accordingly. On the former appeal, the judgment in

[1]Reported in 158 Pac. 477.

favor of plaintiff was reversed and the actions ordered dismissed on the ground that, inasmuch as the contract out of which the whole controversy arose stipulated that all differences between the parties arising out of the contract should be submitted to a board of arbitration whose decision should be final and conclusive, no action could be maintained on the contract by either party until tender of arbitration to the other party and a refusal thereof. Upon rehearing *En Banc*, the majority of the court adhered to the former opinion, and we said "for the reasons therein stated, the judgment is reversed, and the cause remanded with instructions to dismiss the action." 86 Wash. 694, 150 Pac. 1162. Pursuant to the remittitur, the trial court entered a judgment dismissing plaintiff's actions and also defendant's counterclaims, without prejudice. Plaintiff now appeals and is much aggrieved that defendant's counterclaims were not dismissed with prejudice.

It is urged that the counterclaims are separate and independent suits which were tried out and dismissed by the lower court, hence that dismissal was not affected by our decision dismissing the complaints. Plaintiff cites the following decisions which it is asserted sustain this view: *Washington Nat. Bldg., Loan & Inv. Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546; *McKee v. McKee*, 32 Wash. 247, 73 Pac. 358; *Gray v. Granger*, 48 Wash. 442, 93 Pac. 912; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367. In neither of those decisions, however, did this court go farther than to hold that a plaintiff has no right to dismiss his action when a counterclaim has been interposed by defendant demanding affirmative relief. Counsel also quotes, as sustaining his position, Pomeroy's Code Remedies (4th ed.), p. 851, as follows:

"The plaintiff must file a complaint averring facts which are said to constitute a cause of action in his favor. The defendant is expressly permitted to unite in his answer as many defences and counter-claims as he may have. Suppose that he pleads some defence either by way of denial or of new

matter, and also a counter-claim. On the trial he establishes his defence, and thus defeats the plaintiff's recovery upon the alleged cause of action. Does this success cut off his power to go on and prove the facts constituting his counter-claim, and to obtain the judgment thereon? Such a conclusion would be a monstrous perversion of the statute, and would be a virtual repeal of its express provisions which permit the defendant to unite as many defences and counter-claims as he may have."

All this may be granted as a general rule, but when the defense is one which, if sound, would also defeat an action on the matter set up in his counterclaim, the application of the general rule itself would be "a monstrous perversion of the statute." Where, as here, the plaintiff's cause of action failed because of the arbitration provision in the contract out of which arose, not only the plaintiff's complaint, but also the defendant's counterclaims, it would be monstrous to ignore the mutuality of the contract, set aside the judgment and dismiss the one on that ground and not the other. Suppose the defendant's counterclaims had been fully established and the amount found due to plaintiff set off against them *pro tanto*, leaving a large judgment in favor of defendant, would counsel for plaintiff think for a moment that defendant could rightfully insist upon a cancellation of the finding of the amount due plaintiff on the ground that the whole matter should have been arbitrated and take judgment for the full counterclaims without deduction? That idea would doubtless seem "monstrous" to plaintiff's counsel, as it does to us. Yet there is no distinction in principle between the case here and the case supposed.

Counsel is also much aggrieved that, in the former opinions, this court failed to make specific answer to his argument on this question then as now presented. But the ground upon which the original opinion was based so obviously went to every controversy between the parties that a specific direction as to what disposition should be made of the cross-complaints seemed unnecessary.

The trial court has correctly interpreted the decision. Judgment affirmed.

MORRIS, C. J., CHADWICK, FULLERTON, and MOUNT, JJ., concur.

[No. 13177. *En Banc.* June 28, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM H. KELLOGG, *Appellant*.[1]

SEDUCTION—UNCHASTITY—EVIDENCE—ADMISSIBILITY. In a prosecution for seduction, a witness for the defense called to establish the unchastity of the prosecuting witness, who admitted that he had tried to have sexual intercourse with her, may be properly asked to state what he did.

WITNESSES—IMPEACHING OWN WITNESS—SURPRISE. Where, in a prosecution for seduction of one of previous chaste character, the defense is surprised by the statement of its own witness that he had not had sexual intercourse with the prosecuting witness, the defense should be allowed to interrogate the witness as to former variant statements, and lay the foundation for impeachment by such statements.

MORRIS, C. J., and FULLERTON, J., dissent.

Appeal from a judgment of the superior court for King county, Smith, J., entered June 12, 1915, upon a trial and conviction of seduction. Reversed.

William A. Greene and *C. L. Henry* (*R. L. Blewett* and *Benj. S. Ohnick*, of counsel), for appellant.

Alfred H. Lundin, *Erven H. Palmer*, and *Joseph A. Barto*, for respondent.

HOLCOMB, J.—Appellant was prosecuted and convicted in the superior court of the crime of seduction. It was charged that he did, on or about July 24, 1912, seduce and debauch one G. M., a female of previously chaste character.

[1]Reported in 158 Pac. 344.

Two errors are alleged, only one of which we believe entitled to consideration.

In his defense, appellant called a young man as a witness for the purpose of proving that G. M., the prosecuting witness, was not of chaste character previous to July 24, 1912, and for the further purpose of contradicting the testimony of the prosecuting witness that, previous to the date laid in the information, she had never had sexual intercourse with any man other than the appellant after his seductive arts and promises; and of her brother to the effect that he never saw any act of intercourse between the prosecuting witness and the witness in question during the months of July or August, 1912. Upon being placed on the witness stand and examined by appellant's counsel, the young man testified that, during the summer of 1912, until July 31, he lived in the vicinity of the residence of the prosecuting witness on Vashon island; that, at some time while there living, he had "attempted to have sexual intercourse with her." He was then asked to tell the jury what he did. To this an objection was sustained, the trial judge remarking, "If he did not succeed, then it is immaterial." After some colloquy, the jury were excused and the state's attorney was permitted to ask the witness, "Did you or did you not have sexual intercourse with G. M. prior to September 3, 1912?" to which he answered, "I did not." Counsel were informed that they would not be permitted to interrogate or cross-examine the witness further, as it would tend to degrade the young man, and because he was appellant's own witness, and that it was an attempt to impeach his own witness. Counsel for appellant offered to prove that the witness had made a statement to them tending to show that the act of the witness to which he referred was in fact such an act as comes within the legal definition of sexual intercourse, and that they were surprised by his testimony, and therefore entitled to cross-examine him as to his variant statements and to contradict him by proof of such statements. The offer was denied.

The rule is now well settled in a majority of jurisdictions that while a party producing a witness vouches for his character and general credibility, and may not, however greatly surprised by his testimony, impeach his character, nevertheless, when the party is surprised and prejudiced by the unexpected testimony in respect to material facts, the party calling him may interrogate him as to former variant statements (7 Ency. Evidence, 25, 27), and impeach in a proper case by proof of variant statements (Id., 28-31). And this court has said:

"The better rule undoubtedly is, that a party who has been surprised at the unfavorable testimony of a witness he has called in his own behalf, may ask such witness whether he has not made contradictory statements at other times and places, and if the witness denies it, show by other evidence that he has made such statements; . . ." *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414.

In the first place, the witness having testified that, at the time in question, he had "attempted to have sexual intercourse with the girl," appellant had an undoubted right, under all the rules of evidence, to ask him what he did. That was only asking for the detailed facts. If, then, his testimony was surprising and unfavorable to appellant, and at variance with previous statements made by him in regard thereto, appellant has the right to show, *by him if possible*, such contradictory statements, which, however, the witness would have the right to explain. If he denied having made any such variant statements or having any recollection thereof, under the now well-settled rule appellant had the right, by preliminary questions, to "lay the proper foundation" for introducing contradictory evidence by interrogating him as to the time, place, and circumstances, and the substance of such contradictory statements. All of the testimony would then be for the jury to weigh.

In 2 Wigmore on Evidence, it is said:

"§ 896. . . . the rule has been long established, and is in its general validity never today questioned, that the party on whose behalf a witness appears cannot himself impeach that witness in certain ways."

"§ 902. Prior Self-Contradiction. . . . Does, then, the principle of the rule forbidding the impeachment of one's own witness extend its prohibition to this sort of evidence? . . . An honest witness could readily explain how he came to make the former statement; a dishonest one would not be deterred from returning to truth by such a trifling obstacle. On correct principles, then, the use of self-contradictory statements is not forbidden."

"§ 903. . . . There ought to be no hesitation upon the propriety of this evidence. It is receivable on three distinct considerations: 1. The principle of the rule is directed against character evidence, and fails entirely to touch the present sort; 2. The dangers supposed to accompany its use are too speculative and trifling to merit consideration; 3. The exclusion of the evidence would be unjust (1) in depriving the party of the opportunity of exhibiting the truth and (2) in leaving him the prey of a hostile witness. The only real danger that is to be apprehended is that the contradictory statement may be taken by the jury as substantive testimony in the place of the statement on the stand; but this, though a violation of the Hearsay Rule (*post*, § 1018) is not a serious enough disadvantage to outweigh the above considerations, and can always be guarded against by proper instructions."

"§ 909. . . . The guarantee of credibility (if there is one at all) must relate to the witness' general personal trustworthiness of disposition and emotion, not to the correctness of specific statements of fact; since the latter, as is universally conceded (*ante*, § 907) may always be shown to be untrue."

"§ 1018. Since . . . it is 'the repugnancy of his evidence' that discredits him, obviously the Prior Self-Contradiction is not used *assertively; i. e.*, we are not asked to believe his prior statement as testimony, as we do not have to choose between the two. . . . In short, *the prior statement is not hearsay*, because it is not used assertively;

i. e., not testimonially. . . . It follows, therefore, that the use of Prior Self-Contradictions to discredit is not obnoxious to the Hearsay Rule. It follows, conversely, that Prior Self-Contradictions, when admitted, are not to be treated as assertions having any *substantive or independent testimonial value;* they are to be employed merely as involving a repugnancy or inconsistency; otherwise they would in truth be obnoxious to the Hearsay Rule."

The previous chastity of the prosecuting witness was one of the important essentials of the case. It is true that another male witness testified to an act of intercourse with the prosecuting witness previous to her alleged seduction by appellant. The jury may, however, have utterly disbelieved this witness and may have believed, in whole or in part, the testimony of the witness whose rejected testimony is now under consideration, or the evidence of his former variant statements, as to either of which they should have been the sole judges. Upon an issue of chastity it is competent and material to prove previous acts of lewdness or unchastity. 7 Ency., Evidence, 51; *Davis v. State,* 36 Tex. Cr. 548, 38 S. W. 174.

Nor was the testimony of the witness referred to, so far as it went, *negative* testimony so as to preclude contradiction. It was positive evidence of a negative. Direct testimony that an event did not occur, or that a matter is not true, is *positive* and not *negative.* This witness was the actor himself. 9 Ency., Evidence, 865; *Frizell v. Cole,* 42 Ill. 362.

Where a witness swears that a particular act occurred at a specified time and place, or that particular language was spoken by a person to whom he refers, this is affirmative evidence. But, if another witness were at the same place at the same time, and were to swear that he did not observe the act or hear the language of which the other speaks, this would be called negative evidence. If, however, the latter witness were to state that his attention was fully attracted to what

occurred and what was said, and that the act of which the other spoke did not occur, or that the language was not used by the person to whom it was attributed, this would be fully as affirmative as the other. *Frizell v. Cole, supra.*

If the circumstances would tend to show an attempted act of sexual intercourse by the witness with the female, with her consent and any penetration, however slight, but interrupted or frustrated, it would tend to establish her previous unchastity, even though a completed act of intercourse was not had.

That was the purpose of the offered testimony, and it should have been admitted or the variant statements relating thereto. The exclusion thereof was prejudicial. We cannot tell how much weight or credibility it may have had with the jury. We are agreed that this exclusion of evidence by the court constituted prejudicial error and necessitates a reversal, although otherwise the evidence shown by the record was ample to warrant the conviction.

Judgment reversed, and cause remanded for new trial.

Mount and Bausman, JJ., concur.

Ellis, J. (concurring)—The witness should have been required to answer the question as to what he did. That question at least was not impeaching in its character. The answer might have had a tendency to show a consenting mind and disposition on the part of the prosecuting witness. The question was proper and called for an answer possibly material on the question whether the consent to improper relations with appellant was under a promise of marriage. Prior lewd conduct is always material in such a case. I concur in result.

Main and Chadwick, JJ. (concurring)—We concur in the result for the reasons stated by Judge Ellis.

Morris, C. J. (dissenting)—The majority opinion is based upon a misconception of the law as applied to the involved situation. I subscribe to the rule relied upon to sustain the

opinion: that a party who is surprised at the prejudicial testimony of his own witness may, after laying the proper foundation, impeach the witness. Such rule has no application here, however, because the witness sought to be impeached had given no testimony prejudicial to the appellant. The lack of prejudicial testimony has ingrafted an exception upon the rule permitting the impeachment of one's own witness by variant prior statements, which is as firmly established as the rule itself.

The purpose of impeaching testimony is to destroy the weight of adverse testimony. When there is no adverse testimony there is nothing to destroy. The witness had testified that he did not have sexual intercourse with the prosecuting witness. He also denied that the attempted intercourse consisted of acts which counsel for appellant incorporated into the questions, and which it was claimed the witness communicated to counsel. It is claimed this testimony was a surprise to the defendant, and an offer is made to prove variant prior statements. These variant statements, if admitted, would not establish the fact that the witness did have such intercourse, nor could it properly be considered by the jury for that purpose. If the jury believed these contradictory prior statements had been made, it would not establish the fact of the previous intercourse. The only purpose served by the impeaching testimony would be to enable the defendant to get the naked declaration of the witness before the jury. Viewed in every light, this would be pure hearsay. Its character as such cannot be disguised by calling it an impeachment. *People v. Wallace*, 89 Cal. 158, 26 Pac. 650.

The majority opinion is in direct conflict with *State v. Simmons*, 52 Wash. 132, 100 Pac. 269, and *State v. Catsampas*, 62 Wash. 70, 112 Pac. 1116. In the first of these cases it is said, in ruling upon this particular point:

"Had the witness testified to some affirmative fact prejudicial to the appellant, the ruling complained of would perhaps be erroneous. . . . But the witness testified to a

mere negative, and had he been ever so successfully impeached the only effect would be to destroy testimony which was in itself worthless."

In the second case it is said:

"The object of the testimony not being to affect the credibility of a witness concerning any affirmative statement by him, which would be prejudicial to the state's interest, the only effect it could have would be to get before the jury the alleged statement of a discredited witness."

That such is the established rule is supported by the weight of authority. 40 Cyc. 2696; *Culpepper v. State*, 4 Okl. Cr. 103, 111 Pac. 679, 140 Am. St. 668; *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064; *People v. Jacobs*, 49 Cal. 384; *Mercer v. State*, 41 Fla. 279, 26 South. 317; *Hull v. State ex rel. Dickey*, 93 Ind. 128; *Champ v. Commonwealth*, 2 Metc. 17, 74 Am. Dec. 388; *Saylor v. Commonwealth*, 17 Ky. Law 959, 33 S. W. 185; *State v. Reed*, 60 Me. 550; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *In re Kennedy's Estate*, 104 Cal. 429, 38 Pac. 93.

In citing Wigmore on Evidence and Ency. of Evidence, the majority opinion cites only the rule, but fails to observe the exception based upon the negative and nonprejudicial character of the testimony sought to be impeached. The exception is noted in both texts. 2 Wigmore, Evidence, § 904, subd. 8, and § 1043; Ency. of Evidence, 31. *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414, also cited, is not applicable for it refers to a situation where it was permitted to impeach affirmative or prejudicial matter.

For these reasons, the ruling complained of was correct and should be affirmed. I therefore dissent.

Fullerton, J., concurs with Morris, C. J.

[No. 13185. Department Two. July 5, 1916.]

S. Viss *et al.*, *Respondents*, v. P. H. Calligan, *Appellant*.[1]

Libel and Slander—Matters Privileged—Judicial Proceedings—Exceeding Privilege. Where a party on the witness stand stated of his opponent, "He is a thief; he stole two stands of bees of mine," the words were not privileged if the statement was voluntary and not in reply to any question, and was not relevant or pertinent to the subject of inquiry.

Appeal—Review—Harmless Error—Instructions. On appeal by defendant from a judgment for slander, by words uttered in a judicial proceeding, it is harmless error that the materiality and relevancy of the words was submitted to the jury, when the only controversy was as to whether the words were uttered.

Libel and Slander — Pleading and Proof — Special Damages—Words Actionable Per Se. Words imputing a crime are actionable *per se*, and general damages for mental distress may be recovered without alleging or proving special damages.

Appeal and Error—Preservation of Grounds—Objections. Error cannot be predicated upon the court's failure to strike all the unresponsive part of an answer of a witness where the objection to the answer was general, and the court was not advised as to the particular part objected to, and no further motion to strike was made.

Libel and Slander—Matters Privileged—Judicial Proceedings—Question for Jury. Words uttered by defendant, after entry of judgment by a justice of the peace, demanding the arrest of plaintiff for theft, are privileged only if he sought the arrest in good faith and believed he was disclosing the facts for the purpose of advising the justice.

Same—Actions—Instructions. In an action for slander, where there was no evidence that the defamatory words were repeated by the one in whose presence they were uttered, a requested instruction that plaintiff was not entitled to damages by reason of such hearer's repetition of the defamatory words was properly refused.

Same — Damages — Excessive Verdict. An award of $1,000 for general damages upon three causes of action for charging plaintiff on three separate occasions as being a thief is not so excessive as to indicate passion or prejudice on the part of the jury; as the admeasurement is not a matter of exact rule, and the award should not be disturbed, unless so large as to indicate passion or prejudice.

[1]Reported in 158 Pac. 1012.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 13, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for slander. Affirmed.

J. A. Coleman and *James M. Hogan*, for appellant.

C. H. Graves, for respondents.

MAIN, J.—This action was instituted for the purpose of recovering damages for slanderous words alleged to have been uttered by the defendant of and concerning the plaintiff S. Viss.

The complaint contains three causes of action, separately stated. After the issues were framed, the cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs in the sum of $1,000. Motion for a new trial being made and overruled, a judgment was entered upon the verdict, from which the appeal is prosecuted.

The facts are these: About the 1st of March, 1914, S. Viss, hereinafter referred to as the respondent, became a tenant upon a farm owned by the defendant in Snohomish county. This relation continued for a number of months, when it was terminated, and Viss remained in the occupancy of the farm in the appellant's employ. At the time this employment terminated, the respondent claimed that the appellant was indebted to him in the sum of $70.25, and brought an action therefor in the justice court. In that action, the defendant there (the appellant here) orally pleaded a counterclaim. Upon the trial in the justice court, the appellant went upon the witness stand to testify in his own behalf, and in support of his counterclaim. The basis of the first cause of action in this case, as alleged in the complaint, is that the appellant, while so testifying, voluntarily, and not in response to any question propounded by counsel for either party, said of and concerning the respondent:

"That man Viss is the worst man in the country; he is a thief; he stole two stands of bees from me, worth $28, and

tried to steal everything there was on my ranch; he is a dangerous man; he threatened to destroy all the buildings on my ranch and to kill all my cattle."

The appellant, in answer, denied that he used the language imputed to him in the complaint, and pleaded that everything said by him while upon the witness stand was said in response to questions propounded to him by counsel for the plaintiff or the defendant. In submitting the cause to the jury, the allegations of the complaint were narrowed to: "He is a thief; he stole two stands of bees of mine of the value of $28."

The evidence is directly conflicting as to whether the appellant made the statements with which he is charged in the complaint, and which the court submitted to the jury. It is hardly necessary to observe that the question whether the words were uttered was for the jury to determine.

The jury having found in effect by its verdict that the words were uttered, the question arises whether they were privileged because having been uttered in the course of a judicial proceeding. The rule is that words spoken in the course of a judicial proceeding, though they are such as impute a crime to another and, therefore, if spoken elsewhere would be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question in such cases is whether the words were spoken in the course of a judicial proceeding, and whether they were relevant and pertinent to the cause or subject of inquiry. *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376; *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845; *Houghton v. Humphries*, 85 Wash. 50, 147 Pac. 641, L. R. A. 1915 E. 1051.

In this case the respondent claims, and the evidence offered by him supports his contention, that, when the appellant uttered the words with which he is charged, he was not replying to any question propounded to him by counsel for either side, but that he "broke out" during the course of his

testimony and proceeded to defame the respondent to such an extent that the justice cautioned him to desist. The evidence offered on behalf of the appellant supports his claim that the words were not uttered. If the contention of the respondent be true, the appellant is not protected by the rule of privilege, because what was said by him was not in response to questions, and he voluntarily used the occasion not for the purpose of giving testimony called for by interrogatories, or which was relevant and pertinent to the subject of inquiry, but for the purpose of defaming the respondent.

Complaint is made of the instruction which the trial court gave upon the subject of privilege. In this instruction the jury were told that, if the language was spoken in answer to any question propounded to the defendant by either of the attorneys, or by the court, and was responsive to any such question, or if the language spoken by the defendant of and concerning the plaintiff was material or relevant to any issue involved in the trial, no recovery could be had. The particular objection urged against this instruction is that it submits to the jury the question whether words spoken were material or relevant to any issue involved in the trial. But even if this portion of the instruction should be erroneous, which question it is not necessary here to determine, the appellant was not harmed thereby. The controversy was over whether the words were in fact uttered. The evidence did not deal with the question whether they were relevant and pertinent to the issues tried before the justice. The controversy was over whether the words were uttered, and not whether they were relevant or pertinent to any issue. The court might properly have submitted the case to the jury without any reference to whether the words were relevant or pertinent to any issue involved in the trial. This clause was contained in a clear and comprehensive instruction submitting to the jury the issue to be determined, and it does not seem that the jury could have

been misled thereby. The error, if any, was without prejudice.

It is further claimed relative to this cause of action that no damage was shown. No special damages were pleaded, and none was sought to be established by the evidence. If the words were used as claimed by the respondent, they imputed to him the commission of a crime, and hence were actionable *per se*. *Bleitz v. Carton*, 49 Wash. 545, 95 Pac. 1099. If the words were actionable *per se*, they could be made the basis of recovery of general damages without alleging and proving special damages. *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876. Mental distress, which naturally results from the utterance of words, if alleged and proved, is a proper element of general damages. In *Dick v. Northern Pac. R. Co.*, 86 Wash. 211, 150 Pac. 6, it was said:

"Returning then to the third paragraph, we find no special damages alleged as resulting from the publication of the letter there set out. To find a cause of action for libel, therefore, we must find that the statements in the letter, which it is alleged were false, are actionable *per se*. If they are, the plaintiff would be entitled to such general damages for humiliation, injured feelings and mental suffering as would naturally result from the publication, without alleging or proving any special or specific damages."

In this case, mental distress was alleged, and evidence was offered in support thereof.

Some claim is made that the court permitted too wide a latitude relative to the testimony as to mental distress. When the question upon this subject was first propounded, it was objected to as incompetent and immaterial, which objection was overruled. The witness then proceeded to answer, and embodied in his answer certain things which were not responsive to the question. Whereupon counsel for the appellant stated: "I object to that," without specifying what portion of the answer he specifically objected to. The

court thereupon sustained the objection, and struck the answer of the witness relative to the loss of credit. No motion was made to further strike from the answer of the witness. The court was not advised as to the particular objection that counsel had to the answer to the question. Under these circumstances, even though there may have remained in the answer something which was not responsive to the question, it cannot now be made the basis of an error. Indication should have been given to the court by motion to strike from the answer the particular parts thereof which were thought not to be responsive to the question.

What has been said covers the principal questions relative to the first cause of action. The second cause of action will now be considered. That cause of action is based upon words claimed to have been uttered by the appellant in the justice court on the day following the trial, and after the justice had rendered his decision. In that decision the justice entered a judgment for the appellant on his counterclaim in the sum of a few dollars. The item of $28 for two stands of bees, stated in the counterclaim, was disallowed. The respondent claims that, after that judgment was rendered, the justice inquired of the appellant if he were satisfied, and received an affirmative reply. He then inquired of the respondent if he were satisfied, and received a negative reply. Thereupon the appellant jumped to his feet and said: "I want that man Viss arrested right off for stealing my stand of bees," and used other language of similar import. Like the first cause of action, the evidence as to what occurred at this time is in conflict. If the appellant in good faith was seeking the arrest of the respondent, and was disclosing what he believed to be the facts only, for the purpose of advising the justice so that that officer might act advisedly, then the appellant would be protected by the rule of privilege. But, on the other hand, if he employed the occasion in bad faith, or was simply taking advantage of an opportunity to defame the respond-

ent, he would not be within the rule of privilege. In Newell, Slander & Libel (2d ed.), p. 392, it is said:

"When the court holds the communication to be entitled to the privilege, the jury should be instructed to consider and determine whether or not the defendant used the occasion for the sole reason and purpose which conferred the privilege upon his statement; and if the jury find from the surrounding circumstances, as shown by the evidence, that he did so use it solely for such reason and purpose, the verdict will be for the defendant. But if, on the other hand, they find that he employed the occasion in bad faith, to gratify or to further some indirect or malicious motive, or for some other improper reason, the verdict will be for the plaintiff."

Upon this question the cause was properly submitted to the jury.

Referring now to the third cause of action: It is alleged that, on the first day of January, 1915, at the home of one W. N. Boggs, located one and one-half miles from North Bend, Washington, the appellant, in the presence and hearing of one Lorraine Boggs, spoke of and concerning the respondent substantially the same words as are set out in the first cause of action. Here again the evidence is conflicting. In submitting this cause of action, the court was requested to instruct the jury that the respondent was not entitled to recover for any damage that he might have sustained by reason of the words alleged to have been uttered by the appellant having been repeated by Boggs. There is no evidence in the case that Boggs repeated to any one what he testified that the appellant said to him. It was therefore not error to refuse to give the requested instruction. Whether an instruction of this character should be given in any case when no special damages are sought to be recovered, but only general damages, it is not necessary here to determine.

Finally, it is claimed that the damages awarded by the jury are excessive. The verdict was for the sum of $1,000.

There were three causes of action, upon each of which the evidence was sufficient to go to the jury. There is no exact rule by which general damages for slander or libel can be measured. Much must be left in determining the amount to the judgment of the jury. Unless the damages are so large that the court can say that the jury was actuated by passion or prejudice, the amount found by the jury will not be disturbed. The award of $1,000 for general damages upon three causes of action does not seem to us to be so large as to indicate that the jury in determining upon this sum acted through passion or prejudice.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

[No. 13291. Department Two. July 5, 1916.]

RALPH S. HOPKINS, *Respondent*, v. AMERICAN FIDELITY COMPANY, *Appellant*.[1]

INSURANCE—INDEMNITY POLICY—CONSTRUCTION—BREACH OF CONDITIONS BY ASSURED. A condition in an automobile indemnity policy to the effect that the assured shall "not interfere in negotiations for compromise" between the company and any claimant against the assured for injuries, is not breached by the action of the assured in mentioning to the latter the fact of his insurance, and that the lawyer who would call upon him represented the insurance company and not the assured.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 8, 1915, upon findings in favor of the plaintiff, in an action on a policy of indemnity insurance, tried to the court. Affirmed.

Douglas, Lane & Douglas, for appellant.

C. H. Winders, for respondent.

[1]Reported in 158 Pac. 535.

BAUSMAN, J.—Plaintiff sued upon an automobile indemnity policy, during the term of which he had incurred a liability. The insuring company undertook the defense, but afterwards disclaimed it on the ground that plaintiff had withheld the name of a material witness and had meddled in a settlement contrary to express provisions requiring his assistance and information as well as forbidding his interfering in compromises.

Whether plaintiff did withhold the witness' name is in flat contradiction, so we shall not on that disturb a finding that he did not violate the policy. As to the other point, it appears that the day after the accident Hopkins telephoned the claimant expressing his sympathy, stating that his attorneys would endeavor to get a settlement with the insurance company, and that he would call soon to see the claimant, whom he urged not to employ lawyers. The company's counsel protested against Hopkins having mentioned his being insured, and they sought an interview with the claimant themselves as his representative. Hopkins thereupon telephoned the latter that the lawyer coming, though he might call himself Hopkins', was not his but the insurance company's. Of this talk the company learned nothing at that time, and arriving at no settlement, they let the matter drop. Suit being subsequently begun by the claimant, the company took over the defense and, after filing pleadings, agreed on a compromise, but learning of Hopkins' second talk, they dropped the negotiations and withdrew from the case. Hopkins then took over the defense himself under stipulation making the proposed settlement available to him without prejudice to the company's disclaimed liability.

What constitutes "interference" it would be difficult to say, but we are satisfied that here there was none. It is obviously impossible for the assured to avoid conversation with the injured, their families, or their representatives. Indeed, the insurer himself must desire them to say what they can to reduce irritation. If they are then compelled to admit that

they are insured, the law will not forbid their admitting the truth, and as to their voluntarily telling it, that is saying little more than claimants know. The vast majority of those who own automobiles are thus insured, and nearly every claimant knows or believes that they are. Neither can we assume that even if claimants do not know or suppose this, they will be harder to deal with when they find it out. That will depend on whether the owner appears of ample means himself. About this nothing is disclosed here. As for Hopkins' in a degree discrediting the company's lawyer in the second message, language more explicit and positive than "interfere in negotiations for compromise" must be used to forbid what has occurred here. This is not the insured's meddling with settlements accepted or becoming a busybody about offers, of encouraging claimant to a stiff demand, or of secretly furnishing him useful facts.

Finding no breach we do not discuss, what the briefs have not raised, whether in any event a breach of this condition subsequent could be raised as a total release from the policy, either under its own terms or our insurance statutes.

Judgment affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and MAIN, JJ., concur.

[No. 13378. Department Two. July 5, 1916.]

E. B. PALMER *et al.*, *as Palmer & Askren, Respondents*, v. GEORGE H. PARKER, *Appellant*.[1]

EVIDENCE—DOCUMENTARY EVIDENCE—IDENTIFICATION. In an action to recover for legal services, an alleged written agreement of settlement of a cause conducted for defendant, which was not sued upon directly, was sufficiently identified to permit of its introduction in evidence, without identification of signatures, where the attorney testified it was the final agreement made by him on behalf of defendant and the adverse parties to the suit, and where the attorneys for the adverse parties also generally identified it in their depositions.

TRIAL—RECEPTION OF EVIDENCE—DOCUMENTARY—READING TO JURY. A document properly introduced in evidence may be read to the jury either by the party himself or by his attorney, where there are no explanations by the witness other than identification of items mentioned therein.

TRIAL—INSTRUCTIONS—COMMENT ON FACTS. It is not an unlawful comment on the facts, in an action for attorney's fees, in which the burden was upon defendant to prove his affirmative defense of payment of $7,500 in full for past and for future services, to instruct the jury "to entirely disregard said payment of $7,500," if they do not believe by a fair preponderance of the evidence that such sum was intended to cover the future services.

PAYMENT—PLEADING—BURDEN OF PROOF. Payment must be pleaded in an affirmative defense, and the burden of proving it and its specific application is upon the party pleading it.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action by an attorney for legal services, an instruction "to entirely disregard" defendant's payment of a sum pleaded as in full for all legal services, if the defense was not sustained by a fair preponderance of the evidence, was not prejudicial, where the instructions as a whole did not exclude that payment as an item to be considered in determining the reasonable value of the services rendered subsequent to such payment.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 21, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for legal services. Affirmed.

[1]Reported in 158 Pac. 1017.

Walter S. Fulton, for appellant.

A. J. Falknor, for respondents.

HOLCOMB, J.—Respondents, in the superior court, had verdict and judgment thereon for $3,500, upon four alleged causes of action demanding a total of $4,350, for legal services performed by them for appellant.

Appellant's first complaint of error at the trial is upon the admission of an alleged agreement of settlement entered into in a certain cause conducted for appellant, upon the grounds that the agreement had not been identified, was incompetent and immaterial, and was prejudicial to appellant, and further, that respondent Palmer was permitted, over objection by appellant, to emphasize the statements and recitals in this instrument by reading them in detail and explaining them to the jury.

This instrument was, before it went to the jury, generally identified by respondent Palmer, while testifying, as "the final agreement" made by him on behalf of appellant, Mr. Murphy, attorney for the wife of appellant, and the attorneys for the adverse parties, in a suit for more than $1,300,000 pending in King county, numbered 81759, and had also been generally identified by attorneys for the adverse parties testifying by deposition in New York City. It was not sued upon directly and it was not necessary to strictly prove and identify its signatures. It was relevant and material in connection with proofs of the services rendered by respondents, and the objections thereto were therefore not tenable. When properly introduced, it was not error to permit it to be read to the jury, either by the party himself or his attorney. There were no explanations by the witness which did not refer merely to identification of items mentioned in the stipulation or stating what he, as attorney for appellant, did in carrying out the specific provisions of the stipulation. This was proper, competent, and material.

An affirmative defense alleged by appellant was payment. He averred that he paid the sum of $7,500 to respondents as, and agreed by respondents to be, in full for all legal services theretofore performed, and to include payment in full for all such services thereafter to be and which were rendered by respondents to appellant. This was denied, and the proofs thereon were conflicting. Upon this issue the court instructed:

"If you do not believe by a fair preponderance of the evidence that said $7,500 was intended to and agreed to cover such future services as are referred to in the complaint, *then it is your duty to entirely disregard said payment of said $7,500;*"

the italicized portion being assailed as a comment on facts. We do not so regard it. This referred to an affirmative plea as to which the burden was upon appellant. If he failed to show by a fair preponderance of the evidence his specific affirmative allegations, that defense was wiped out. That is all the jury were told.

Closely related to this, however, are instructions also attacked by appellant, among them one that the burden of proof was upon appellant to prove that the payment of $7,500 covered the services involved herein. The contention is untenable under the decisions of this state that it is necessary to plead payment affirmatively (*Richards v. Jefferson*, 20 Wash. 166, 54 Pac. 1123; *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177), and the burden of proving payment and for what specific application is upon the party pleading it. 30 Cyc. 1264.

This applies also in effect to appellant's assignment No. 4, as to another instruction concerning a cross-complaint for $884, alleged to have been paid to respondents. It is urged, however, that the payment of the $7,500 for services rendered was a fact and circumstance material to be considered by the jury in order to intelligently determine the value of the services here sued for, and not to be disregarded.

The pleadings and proofs of the parties show that appellant was involved in a vast amount of litigation arising out of some wireless company stock transactions and business transactions of his own. There were several civil suits in which he was involved besides the large one heretofore mentioned. There was also a criminal prosecution by the United States against him. Appellant's answer, among other things, alleged that:

"After the conclusion of the plaintiff E. B. Palmer's services in behalf of the defendant in said prosecution, he stated to Clyde Parker, the son of defendant and his authorized agent and representative, that his bill and charge for services was $7,500, and then and there represented that said charge was in full of and included any and all services theretofore rendered by the plaintiff E. B. Palmer in behalf of the defendant in said criminal prosecution, or which he might thereafter be called upon to perform therein, or in any matter that had grown out of, or that might thereafter grow out of, said criminal prosecution or the connection of the defendant with and his interest in, the United Wireless Telegraph Company."

In various instructions the jury were told that, if they believed from a fair preponderance of the evidence the foregoing settlement was made as pleaded, it was a complete defense to any and all claims by respondents growing out of or concerning any matter; that if they found such services were performed as alleged by plaintiffs at the request of defendant, and not volunteered by plaintiffs, then plaintiffs were entitled to compensation for the reasonable value of such services; and in determining the reasonable value of such services, the jury were to take into consideration the nature of the controversy, the skill and labor required, the responsibility imposed, the standing and experience of the attorney, the success achieved, and the reasonableness or unreasonableness of the charges made, from all the evidence and facts and circumstances in the case as disclosed by the evidence.

Viewed in connection with the foregoing (summarized) very fair and comprehensive instructions, the jury could hardly avoid considering the fact of payment of a certain sum for certain services in considering the charges of the attorneys for further or other services, in any event, as a means of comparison and upon the question submitted to them of the reasonableness of the fees charged and demanded therefor. They were in possession of every fact and circumstance as disclosed by the evidence, of services rendered, nature and result thereof and payments made by appellant, and were to determine for what purpose specifically the payments were made. While so determining, they were necessarily considering every fact and circumstance and the respective relations thereof and their effect. Taken as a whole, the instructions, not all of which have been mentioned, were perfectly fair to appellant and correct.

Other errors claimed in general related to or were of the same nature as those discussed. We find no error in any of the instructions under the issues in the case.

Affirmed.

MORRIS, C. J., BAUSMAN, PARKER, and MAIN, JJ., concur.

[No. 13471. Department Two. July 5, 1916.]

CAROLINE ALEXANDER, *Executrix etc., Respondent*, v. CHARLES W. BENNETT *et al., Appellants*.[1]

ADVERSE POSSESSION—VACANT LANDS—ACTUAL OCCUPANCY. Title by adverse possession is sufficiently shown, although the taxes had been paid by the legal owner, where there was occupancy by plaintiff for the statutory period of a small strip of vacant land, which had been cut off from the main body of the legal owner's land by a fence maintained by plaintiff and his grantor for many years, and which had been used as a boat landing by plaintiff and others with his permission, and had been cultivated by plaintiff, not completely, but to the extent that the nature of water front land allowed.

Appeal from a judgment of the superior court for King county, Smith, J., entered August 18, 1915, upon findings in favor of the plaintiff, in an action of ejectment, tried to the court. Affirmed.

Flick & Frater, for appellants.

Ryan & Desmond, for respondent.

BAUSMAN, J.—Ejectment based upon adverse possession during more than the statutory ten years against defendant and his grantors, who present perfect legal title with payment of taxes.

Only a small portion of defendants' land, much less than an acre, is in question, a small appendix from the main body along a bay in front of plaintiff's farm, separating that farm from the water and joined with the rest of defendants' land by a mere neck. Plaintiff showed that, when she and her husband bought their farm more than twenty-five years ago from its then owner, the latter spoke of this fringe as part of it and pointed out a fence across this neck. The fence, they were told, constituted the line between the estates, which indeed seems physically and naturally the place of sev-

[1]Reported in 158 Pac. 534.

erance. A buyer of the plaintiff's land might easily conceive this small piece to be a part of it.

The tract claimed is very small and, while every bit of it has not been, a part of it has been, kept in cultivation. Moreover, some structures were long ago erected by the Alexanders on a portion. From the cultivated piece there is a path running to the shore and ending at a landing, which in that neighborhood has long been called Alexander's landing. While this landing has been used more or less by the general public, it could be used only through the Alexander's land and by their permission. Finally, fairly conspicuous signs against trespassers have long since been kept up by the Alexanders.

Under our decisions adverse possession of vacant lands goes, to be sure, only to so much of them as is actually occupied, yet the uncultivated portion here was part of a shore which varied with the fullness of the lake and was not appropriate for cultivation at all. Thus it can fairly be said that all was kept in cultivation that was fit for cultivation. The fence across the neck has always been maintained, the cultivation has been continuous, and the landing and the path always in use. In short, considering how small this tract is, there has been a physical possession of the whole.

The case was tried without a jury, and the judge having personally inspected these premises has had an advantage impossible to us with the aid of photographs and diagrams. He has found that this possession by the Alexanders was from the first in belief of ownership, adverse, open, exclusive, notorious, and continuous during more than the statutory period, so under our long established rules we shall not disturb his findings. Though there was much contradictory testimony, there was abundance to sustain them.

Judgment affirmed.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 12960. Department One. May 6, 1916.]

PAUL ALLEN, *Respondent*, v. JOSEPH L. JAFFE, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 16, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

C. H. Winders, for appellant.
Harry Sigmond, for respondent.

PER CURIAM.—The sole question presented in this case is one of fact. It is whether the defendant, Joseph L. Jaffe, employed the plaintiff, Allen, to manage a saloon, upon a weekly salary, as claimed by the plaintiff, or whether the appellant permitted the plaintiff to conduct the saloon upon his own account.

The trial court, after hearing the conflicting evidence, finally found in favor of the plaintiff. The defendant, Jaffe, has appealed from that judgment. After a careful review of the evidence, we are not satisfied that the trial court was wrong.

The judgment is therefore affirmed.

CHADWICK, J. (dissenting)—I would draw a different conclusion from the facts. In my opinion the judgment of the court is not sustained by a preponderance of the evidence. I therefore dissent.

[No. 12770. Department One. May 10, 1916.]

JOSHUA R. VANSANT, *Respondent*, v. JOHN P. HARTMAN *et al.*, *Appellants*.[2]

Appeal from a judgment of the superior court for King county, Claypool, J., entered December 31, 1914, upon findings in favor of the plaintiff, in an action to determine the title to real property, tried to the court. Reversed.

Edward Brady, *John P. Hartman*, and *H. A. P. Myers*, for appellants.

Charles S. Gleason and *Peters & Powell*, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—The respondent petitions this court for a modification of the opinion filed herein, 88 Wash. 636, 153 Pac. 1062. The

[1]Reported in 155 Pac. 1150.

[2]Reported in 157 Pac. 461.

appellants have filed a petition for a rehearing, arguing, in substance, that the original lease has been terminated because of failure to pay rent.

We think the original opinion is clear; but in order to avoid confusion or misconstruction of the opinion, we may say that it was our intention to hold that the plaintiff, Vansant, is entitled to all the rights of the original lessee under the lease and liable to perform the lease as the original lessee; that Mr. Martin has succeeded to all the rights of the original lessor and is now the equitable owner of the fee, subject to the rights of the lessee to purchase under the terms of the lease at the expiration of ten years from the date thereof; and that Mr. Hartman holds the legal title, subject to the payment of $25,000 and interest. With this modification, if it may be said to be such, we think the original opinion is plain.

In reference to the petition of the appellants for a rehearing, we are satisfied that there was no intention of the parties to terminate the lease. After the foreclosure action, the respondent concluded that he was the owner of the fee and, therefore, did not pay rent. To hold that he had forfeited his lease, under the complicated conditions of the case, would be a manifest injustice.

The petition for rehearing is therefore denied.

[No. 13058. Department Two. May 10, 1916.]

KATHERINE BRENSETH, *Respondent*, v. THOMAS BRENSETH, *Appellant*.[1]

Appeal from an order of the superior court for Franklin county, Linn, J., entered April 15, 1915, modifying a decree of divorce as respecting the payment of alimony, after a hearing before the court. Affirmed.

Chas. W. Johnson, for appellant.
Driscoll & Leonard, for respondent.

PER CURIAM.—On June 4, 1914, respondent obtained a decree of divorce from appellant in which she was awarded alimony in the sum of $20 a month. This sum was paid by appellant until about March 16, 1915, when he moved the court to set aside the allowance, alleging changed condition of the parties and misconduct of respondent. The lower court refused to set the allowance aside, but reduced it to $15 a month. An appeal is taken from the order so modifying the decree.

Appellant contends that the facts show such a changed condition of the parties and such misconduct on the part of respondent that the

[1]Reported in 157 Pac. 462.

trial court erred in refusing to discontinue the alimony. It will serve no good purpose to set forth the facts. Suffice to say, we have read the statement of facts, which is short, and agree with the findings of the trial court.

The judgment is affirmed.

[No. 12797. Department Two. May 13, 1916.]

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY *et al.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*.[1]

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 5, 1915, setting aside an assessment roll for a public improvement, on appeal from the order of the city council confirming the roll. Reversed.

H. M. Stephens, *Wm. E. Richardson*, *Ernest E. Sargeant*, and *Dale D. Drain*, for appellant.

A. C. Spencer and *Hamblen & Gilbert*, for respondent Oregon-Washington R. & Nav. Co.

F. W. Girand, *Robertson & Miller*, and *Skuse & Morrill*, for respondents, except Oregon-Washington R. & Nav. Co.

PER CURIAM.—This is an appeal by the city of Spokane from a judgment of the superior court annulling and setting aside a reassessment roll. The case is similar to the case of *Nichols v. Spokane*, *ante* p. 235, 157 Pac. 863. The decision in that case, as well as this case, has been delayed awaiting the decision of *Kuehl v. Edmonds*, *ante* p. 195, 157 Pac. 850, upon rehearing.

For the reasons stated in the case of *Nichols v. Spokane*, *supra*, the judgment in this case will be reversed, and the cause remanded with direction to the superior court to enter a judgment confirming the reassessment roll.

[1]Reported in 157 Pac. 864.

[No. 12978. Department Two. May 19, 1916.]

PETER MORRISON *et al.*, *Respondents*, v. H. J. GUNNING *et al.*, *Appellants*.[1]

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 18, 1915, upon findings in favor of the plaintiffs, in an action of forcible entry and detainer, tried to the court. Affirmed.

Skuse & Morrill, for appellants.
Voorhees & Canfield, for respondents.

PER CURIAM.—The issues and questions presented in this case are the same as in the case of *Ridpath v. Denee*, 85 Wash. 322, 148 Pac. 15; and for the reasons there stated, the judgment must be affirmed.

[No. 13306. Department Two. June 6, 1916.]

OLYMPIA LIGHT & POWER COMPANY, *Appellant*, v. THE CITY OF OLYMPIA, *Respondent*.[1]

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 11, 1914, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Troy & Sturdevant, for appellant.
George R. Bigelow, for respondent.

BAUSMAN, J.—The defendant city sets off against an admitted balance due plaintiff for light an indebtedness of plaintiff upon a contract concerning street paving. An attempt at arbitration of the latter amount was properly held defective by the lower court, which, considering the matter on its merits, rendered judgment against the plaintiff. The facts are intricate and, to the profession or public, of little use when discussed in detail, the dispute involving a contract of no general moment and adapted only to a transitory situation. As between the parties, the case is sufficiently discussed by the lower court in a written opinion, which we deem ample and correct. We have examined the record with care and are satisfied to affirm the judgment, and it is accordingly so ordered.

MORRIS, C. J., MOUNT, MAIN, and HOLCOMB, JJ., concur.

[1]Reported in 157 Pac. 1199.

[No. 12224. Department One. June 16, 1916.]

C. A. GWINN, *Respondent*, v. ANNA D. FORD *et al.*, *Appellants*.[1]

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 30, 1914, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defenses, in an action on promissory notes, tried to the court. Reversed.

Mulligan & Bardsley, for appellants.
J. N. Pickrell and *Joseph Rosslow*, for respondent.

ON REHEARING.

PER CURIAM.—This is a companion case to that of *Gwinn v. Ford*, *ante* p. 498, 158 Pac. 536. For the reasons therein given, the judgment is reversed and the cause remanded.

[No. 13229. Department One. June 21, 1916.]

MAUSOLEUM SALES COMPANY, *Appellant*, v. L. H. BREWER *et al.*, *Respondents*.[2]

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered April 27, 1915, upon granting a nonsuit, dismissing an action on contract. Affirmed.

Martin F. Smith, for appellant.
Morgan & Brewer, for respondents.

PER CURIAM.—This case was tried at the same time, and involves the same state of facts, as *Mausoleum Sales Co. v. Morgan*, *ante* p. 617, 158 Pac. 255, and on the authority of that case is affirmed.

[1]Reported in 158 Pac. 536.

[2]Reported in 158 Pac. 256.

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1. BAILMENT — MANDATARY — LIABILITY — MEASURE OF DAMAGES. A mandatary under a gratuitous bailment to buy logs with his prin-

BAILMENT—CONTINUED.

cipal's money, which were to be delivered to a shingle mill to be sawn for the principal's account, and the shingles or proceeds turned over to the principal, is liable only for the latter's loss, and not for the whole sum intrusted; nor would the mandatary's departure from the instructions of his principal render him liable for the whole sum intrusted, if his action did not amount to gross negligence. *Bradford-Kennedy Co. v. Buchanan* 539

BANKS AND BANKING:

Taxation of banks and bank stock, see TAXATION, 1.

BAR:

Of action by former adjudication, see JUDGMENT, 2, 3.
Of action by limitation, see LIMITATION OF ACTIONS.

BENEFITS:

Assessment of, see MUNICIPAL CORPORATIONS, 7.

BILLS AND NOTES:

Estoppel to defend action for purchase price, see ESTOPPEL.
Parol evidence to vary legal effect of indorsement, see EVIDENCE, 6.
Parol evidence as to condition subsequent, see EVIDENCE, 8.
Payment by note in lieu of cash, see PAYMENT, 1.
Authority of agent to collect interest coupon notes, see PRINCIPAL AND AGENT, 2, 3.
Note as consideration, see SALES, 7.
Conversion of note, see TROVER AND CONVERSION.

1. BILLS AND NOTES—CHECKS. A check imposes no obligation on the drawee to pay, but is an implied promise by the drawer to pay in case it is not accepted. *Peninsula National Bank v. Pederson Construction Co* 621

2. SAME—"CHECKS"—WHAT CONSTITUTES. A time check of the amount due a laborer on construction work, made "payable at" a certain bank, constitutes a negotiable "check," under the negotiable instrument law, Rem. & Bal. Code, § 3392, providing that an instrument to be negotiable must contain an unconditional promise to pay; Id., § 3394, providing that a promise to pay is unconditional though coupled with a statement of the transaction which gives rise to the instrument; and Id., § 3477, providing that the use in a check of the words "payable at" a bank, is equivalent to an order on the bank to pay the amount called for. *Peninsula National Bank v. Pederson Construction Co* 621

3. BILLS AND NOTES — CHECKS — PRESENTMENT — REASONABLE TIME. Under Rem. & Bal. Code, § 3576, providing that a check must be presented for payment within a reasonable time, a delay of one week in presenting a check capable of presentment in two days was so

BILLS AND NOTES—CONTINUED.

unreasonable as to relieve the drawer from liability for its nonpayment by reason of the suspension of the bank. *Peninsula National Bank v. Pederson Construction Co*..... 621

4. BILLS AND NOTES—ACTIONS—DEFENSES—FRAUD. In an action on promissory notes by an indorsee, an answer alleging that the notes were procured by fraudulent representations, the result of a conspiracy between the payee and the plaintiff to whom the notes were immediately indorsed, and that plaintiff was at all times advised as to the contract under which the notes were given, sets up a good defense. *Gwinn v. Ford*..... 498

BLASTING:

Degree of care in street work, see EXPLOSIVES.

BONDS:

On appeal, see APPEAL AND ERROR, 7, 8.
Indemnity bond insuring fidelity of employees, see INSURANCE, 3.
Municipal officers, see MUNICIPAL CORPORATIONS, 2.
Contractor's bonds, see MUNICIPAL CORPORATIONS, 4.
On public work, see PRINCIPAL AND SURETY.
Bonding state capitol lands for purpose of erecting buildings, see STATES.

BOUNDARIES:

Of assessment district, power of court to fix, see MUNICIPAL CORPORATIONS, 6.

BREACH:

Of condition, see INSURANCE, 2.
Of warranty, see INSURANCE, 4, 5.
Of contract of sale, see SALES.
Of warranty, see SALES, 5.
Of contract for sale of land, see VENDOR AND PURCHASER, 7-9, 13-16.
Of contract to supply water for irrigation, see WATERS AND WATER COURSES, 4.

BROKERS:

1. BROKERS — POWERS — SCOPE OF AUTHORITY — WAIVER — RIGHTS OF PRINCIPAL. It is beyond the scope of the authority of a real estate broker, employed to effect an exchange of properties, to enter into an agreement waiving the right to rely upon representations made by the other party as an inducement to the trade, and the principal is not estopped by the agent's signing such an agreement without notice to him. *Soboda v. Nolf & Co*..... 446

2. BROKERS — COMMISSIONS — ABANDONMENT OF EMPLOYMENT. A broker is not entitled to a commission on a sale of property to a customer first introduced by him, where the sale was not effected

BROKERS—CONTINUED.

until after the employment had been abandoned by the broker. *Cole v. Carruthers*..... 500

3. BROKERS—COMMISSIONS—ABANDONMENT OF CONTRACT. A broker is not entitled to a commission on a sale of property, where after his abandonment of the employment, a person whom he had introduced to the vendor as a customer negotiated a sale to a third person, who gave the negotiator an option to purchase a certain interest in the property. *Cole v. Carruthers*..... 500

BURDEN OF PROOF:

To show payment, see PAYMENT, 2.

BURIAL GROUNDS:

See CEMETERIES.

CANCELLATION OF INSTRUMENTS:

Rescission of exchange of property, see EXCHANGE OF PROPERTY.
Recission of contracts, see VENDOR AND PURCHASER, 1-7, 16.

CAPACITY TO SUE:

Admission in pleading, see PLEADING, 1.

CARRIERS:

1. CARRIERS—PASSENGERS—SETTING DOWN PASSENGERS — INTERURBAN CARS. The rule applicable to street cars that the relation ordinarily terminates when the passenger gains a secure footing upon the street, applies to one alighting from an interurban train. *Welsh v. Spokane & Inland Empire R. Co*..... 260

2. SAME—SETTING DOWN PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence is not shown in allowing an intoxicated passenger to alight unattended from an interurban car, with many other passengers, on a safe unobstructed city street, whereupon he leaned against the car with his foot on the rail and was injured when the train moved, where there was no evidence that he staggered or required special attention when leaving the car, or that any one knew of his dangerous position, although it was known that he was intoxicated when he boarded the train; since actual knowledge of his incapacity was lacking, and he was discharged at a safe place, without any knowledge of his dangerous position. *Welsh v. Spokane & Inland Empire R. Co*..... 260

CAVEAT EMPTOR:

See VENDOR AND PURCHASER, 1.

CEMETERIES:

Tender in action to recover purchase price of burial crypt, see TENDER.

CEMETERIES—CONTINUED.

1. CEMETERIES—SALE OF CRYPT—CERTIFICATE—EXECUTION. A corporation holding a contract of subscription for the purchase of a burial crypt cannot recover from the subscriber upon the tender of a certificate for the crypt made by another corporation which at the date of the certificate neither had title to the property nor had any corporate existence. *Mausoleum Sales Co. v. Morgan*..... 617

2. CEMETERIES — SALE OF CRYPT — CONTRACT FOR DEED — TENDER OF CERTIFICATE. Where a contract for a cemetery crypt provided for the delivery of a deed free of all incumbrances, the tender of a certificate in place of a deed was inadequate. *Mausoleum Sales Co. v. Morgan* 617

CERTIFICATE:

For burial crypt, tender of, see CEMETERIES.
Certified copies, see EVIDENCE, 9.
Of inspection under factory act, as evidence, see MASTER AND SERVANT, 12.

CERTIORARI:

1. CERTIORARI—WHEN LIES—INTERLOCUTORY ORDERS—APPEAL—FINAL ORDERS. Certiorari does not lie to review an interlocutory order denying a motion to strike a complaint in intervention, as the same is not reviewable either by appeal or writ of certiorari prior to the rendition of final judgment in the action, under Rem. & Bal. Code, § 1716, limiting the right to appeal from interlocutory orders affecting a substantial right to orders that determine the action or prevent a final judgment therein. *State ex rel. Rutter v. Superior Court* 304

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 3.

CHANGE OF VENUE:

Of civil actions, see VENUE.

CHARGE:

To jury in civil actions, see TRIAL, 4, 5.

CHATTEL MORTGAGES:

Validity as against creditors of insolvent corporation, see CORPORATIONS, 13.
Parol evidence to modify, see EVIDENCE, 7.

CHECKS:

See BILLS AND NOTES, 1-3.

CHILD:

Contributory negligence in riding bicycle in city street, see MUNICIPAL CORPORATIONS, 22, 23.

CITATION:

See PROCESS.
On appeal, see APPEAL AND ERROR, 8, 9.

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

Against county game fund, see COUNTIES, 2, 3.
Against city, see MUNICIPAL CORPORATIONS, 28-30.
Against contractor's bond, see PRINCIPAL AND SURETY.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLECTION:

Of notes by agent, authority, see PRINCIPAL AND AGENT, 2.

COLLISION:

With automobile at crossing, see RAILROADS, 1-6.
With automobile in city street, see MUNICIPAL CORPORATIONS, 22-25.

COMMENT:

On evidence by judge, see CRIMINAL LAW, 2.

COMMERCE:

1. COMMERCE — INTERSTATE COMMERCE — WHAT CONSTITUTES — STATE INDUSTRIAL INSURANCE—STATUTES. The work of repairing a bridge, continuously used by an interstate railroad, by placing new concrete piers underneath it to carry steel braces for its support, is work in interstate commerce, and so not within the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1, rendering certain employers liable for insurance premiums. *State v. Bates & Rogers Construction Co.*. 181

2. SAME—INTERSTATE COMMERCE — INDEPENDENT CONTRACTORS — FEDERAL EMPLOYERS' LIABILITY ACT. Independent contractors repairing a railroad bridge used in interstate commerce, are within the provisions of the Federal employers' liability act, since by § 5 (Comp. St. 1913, § 8661), any contract intended to enable any common carrier to exempt itself from liability created by the act is void to that extent; and hence are not within the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1, rendering certain employers liable for insurance premiums. *State v. Bates & Rogers Construction Co.*.181

COMMISSIONS:

Of broker, see BROKERS, 2, 3.
Game wardens and commissions, see GAME.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY DEBT:

Of husband, liability of wife's separate property, see HUSBAND AND WIFE, 4.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 3.

Admissions in pleading as to right of husband to sue for damages to without joining wife, see PLEADING, 1.

COMPARATIVE NEGLIGENCE:

See NEGLIGENCE, 6, 7.

COMPENSATION:

Of broker, see BROKERS, 2, 3.

Of county officers, see COUNTIES, 2, 3.

Of attorney in foreclosure suit, see MORTGAGES, 3.

Of officers, recovery, see OFFICERS.

COMPLAINT:

In criminal prosecutions, see CRIMINAL LAW, 1.

COMPUTATION:

Of period of limitation, see LIMITATION OF ACTIONS.

CONCLUSIVENESS:

Of decree in probate, as to fact and time of death of deceased, see EXECUTORS AND ADMINISTRATORS, 2-4.

Of judgment, see JUDGMENT, 2, 3.

Of judgment correcting excessive valuation of property, see TAXATION, 3.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITION:

Precedent to right to offset reserve value of policy against loan, see INSURANCE, 7.

CONDITIONAL SALES:

See SALES, 6-8.

CONDITIONS:

In insurance policies, see INSURANCE, 1, 2, 6-9.

CONDUCT:

Of judge at criminal trial, see CRIMINAL LAW, 2-4.

Of juror ground for new trial, see NEW TRIAL.

CONFIRMATION:

Of proceedings to establish irrigation district, see WATERS AND WATER COURSES, 9, 10.

CONGRESS:

Power to extend period of limitation on alienation of lands by Indians, see INDIANS, 2.

CONSIDERATION:

For note given as payment on conditional sale contract, see SALES, 7.

CONSTITUTIONAL LAW:

Act providing for bonding of state capitol lands and creating debt for interest charges as violating constitution, see STATES.
Subjects and titles of statutes, see STATUTES, 2-5.
Amendment of statutes, see STATUTES, 5.

1. CONSTITUTIONAL LAW — DUE PROCESS — WORKMEN'S COMPENSATION ACT. The due process clause of the Federal constitution is not violated by an act adding liability to the employer to his employee through the act of a stranger on the premises, nor by the provision of the act making the employer an insurer of the employee while at the employer's plant. *Stertz v. Industrial Insurance Commission* 588

CONSTRUCTION:

Of insurance policy, see INSURANCE, 1-3.
Of workmen's compensation act, see MASTER AND SERVANT, 1-8.
Of contract for public improvement, see MUNICIPAL CORPORATIONS, 3, 4.
Of statutes limiting power of assessment, see MUNICIPAL CORPORATIONS, 14.
Of ordinance relating to guy wires in city street, see MUNICIPAL CORPORATIONS, 20.
Of contract of sale, see SALES, 1.
Of statutes, see STATUTES.
Of street railway franchise, see STREET RAILROADS, 3.
Of instructions to jury, see TRIAL, 4.
Of abstract of title, see VENDOR AND PURCHASER, 8.
Of contract for land, see VENDOR AND PURCHASER, 10, 13.

CONTEST:

Of will, see WILLS.

CONTRACTORS:

Work in interstate commerce, see COMMERCE.
Degree of care in using powder in street work, see EXPLOSIVES.
On public work, see MUNICIPAL CORPORATIONS, 3-5.
Bonds of, see PRINCIPAL AND SURETY.

CONTRACTS:

See BILLS AND NOTES; INSURANCE; SALES.
For broker's commission, see BROKERS, 2, 3.
For cemetery crypt, see CEMETERIES.
Contract rights as affecting right to condemn private way of necessity, see EMINENT DOMAIN, 4.
Parol evidence to vary written contract, see EVIDENCE, 5-8.
Rescission of contract for trade of property, see EXCHANGE OF PROPERTY.
Interest on, see INTEREST.
Computation of period of limitations, see LIMITATION OF ACTIONS, 2.
To provide medical attendance to injured workman, see MASTER AND SERVANT, 10.
For public improvements, see MUNICIPAL CORPORATIONS, 3-5.
For services, performance, see PHYSICIANS AND SURGEONS.
Suretyship, see PRINCIPAL AND SURETY.
Specific performance, see SPECIFIC PERFORMANCE.
Creation of debt for interest charges on capitol building bonds, see STATES.
Street railway franchise, see STREET RAILROADS.
Tender in action for purchase price, see TENDER.
Election to recover on implied contract, see TROVER AND CONVERSION, 1.
Sales of realty, see VENDOR AND PURCHASER.
For water, see WATERS AND WATER COURSES, 3, 4.

CONTRADICTION:

Of witness, see WITNESSES, 3.

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE, 5.
Of servant, see MASTER AND SERVANT, 18, 19.
Of person injured on street, see MUNICIPAL CORPORATIONS, 22, 23.
Of person injured on or near railroad tracks, see RAILROADS, 4.

CONVERSION:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

CONVEYANCES:

See MORTGAGES.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
Contracts to convey, see VENDOR AND PURCHASER.

CORPORATIONS:

See CEMETERIES; MUNICIPAL CORPORATIONS.
Acquisition of property by condemnation, see EMINENT DOMAIN, 1-3.
Accrual of action on unpaid stock subscription, see LIMITATION OF ACTIONS, 4.
Taxation of corporations and corporate property, see TAXATION.

CORPORATIONS—CONTINUED.

1. CORPORATIONS—STOCK SUBSCRIPTION—FRAUD—PURCHASE OF PROPERTY. An allegation of fraud, inducing a subscription to the capital stock of a corporation organized for the purpose of purchasing certain real estate, is not sustained where the preponderance of the evidence was to the effect that the property was acquired at its then market value. *Handley Investment Co. v. Trenholme*..... 146

2. CORPORATIONS—STOCKHOLDERS—SUBSCRIPTION — PAYMENT IN PROPERTY—SUFFICIENCY. Where property turned over to a corporation in exchange for stock was of the value of the par value of the stock issued as fully paid up, the transfer is valid as full payment of the stock subscription, in the absence of fraud. *Kennedy v. Norton* 244

3. CORPORATIONS — STOCK — SALE — FRAUDULENT REPRESENTATIONS — MATTERS OF FACT. False representations made to induce the purchase of corporate stock, to the effect that the seller was intimately acquainted with the affairs of the company, that he knew that the stock was of greater value than the price at which it was selling, that he knew the price would rise in a few days, and that he knew where the stock could be sold at a marked increase, were representations as to matters of fact, and not as to matters of opinion. *Gwinn v. Ford*..... 498

4. CORPORATIONS — SALE OF STOCK—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. The rescission of a sale of corporate stock of a moving picture concern for fraud is warranted, where the preponderance of the evidence supported the claim of the plaintiff, a young man 24 years of age without business experience, that the defendants, officers and principal stockholders of the company, falsely represented that the company was making money above expenses and had for eight weeks, when in fact it had always lost money, that its lease called for monthly rentals of $150 to $200 a month, when in fact it called for $250 per month, and that plaintiff relied on the representations and was induced thereby to purchase stock. *Boehme v. Broadway Theater Co*..... 104

5. SAME — SALE OF STOCK — FRAUD — RELIANCE UPON — MATTERS OF FACT. A sale of stock in a corporation may be rescinded for false representations as to its financial condition, the volume of its business and the amount of its income and expenses being matters of fact peculiarly within the knowledge of the officers of the company making the same, even though there was an opportunity to investigate. *Boehme v. Broadway Theater Co*..... 104

6. CORPORATIONS — SALE OF STOCK — ACTION FOR PRICE—FRAUD—EVIDENCE. In an action for the price of stock, it is a good defense that it was induced by the fraud of the president and principal stockholder, who represented that the corporation was in a prosperous condition and the book value of the stock was a certain amount when

CORPORATIONS—CONTINUED.

in fact it was not, and that a certain man of prominence was a member of the board of directors when in fact he was not. *Gates v. Gregory* 151

7. SAME—SALE OF STOCK—FRAUD OF OFFICER—NOTICE TO CORPORATION. A corporation is constructively charged with notice of fraud in the sale of stock, by its president and principal stockholder, who was in exclusive charge of its affairs, and acted alone, both for himself and the company, in making the sale of his stock, taking a note therefor secured by the stock as collateral, and transferring the note to the corporation before maturity, giving himself credit upon the books of the company. *Gates v. Gregory*..... 151

8. CORPORATIONS—OFFICERS, AGENTS AND "SERVANTS"—EMPLOYMENT—REMOVAL. Under Rem. & Bal. Code, § 3683, authorizing corporations to appoint "officers, agents and servants," to require security of them, and to "remove them at will," the term "servants" includes an "assistant horticulturist" employed for one year by an "orchards" company, and is not to be restricted to employees in a fiduciary capacity. *Barager v. Arcadia Orchards Co*..... 294

9. CORPORATIONS—AGENCY—"UNDERWRITERS." An "underwriter" of the stock and bonds of a telephone company is not an agent of the company, as a matter of law, as underwriting in this sense is a purchase together with a guaranty of a sale of the bonds, by one who sells in his own interest only. *Fraser v. Home Telephone & Telegraph Co*..... 253

10. SAME — AGENCY BY ESTOPPEL — UNDERWRITERS. A telephone company is not estopped to deny the agency of an underwriter of its stocks and bonds from the fact that it held him out, and permitted him to advertise, as an underwriter to one who did not know what that term meant and therefore could not have acted upon it as a representation that he was an agent. *Fraser v. Home Telephone & Telegraph Co*..... 253

11. SAME — AGENCY —"UNDERWRITERS"— EVIDENCE — SUFFICIENCY. A telephone company cannot be held for the acts of an underwriter of its stocks and bonds, as its agent, in failing to deliver stock sold and converting the money paid therefor, where no representation was made that he was agent of or ever represented the corporation, and it appears that he had merely underwritten certain of its stock and bonds, subscribed for and issued to another telephone company in payment for the construction of the telephone plant, in which the issuing company had no further interest; and it is immaterial that he used a prospectus of the company to aid in his sales, since there was no evidence of agency; especially where no demand was made on the company until three years after the purchase. *Fraser v. Home Telephone & Telegraph Co*..... 253

CORPORATIONS—CONTINUED.

12. CORPORATIONS—POWERS—TRUSTS. The fact that a land company in the transaction of its authorized business necessarily sustains fiduciary relations to a limited extent toward those dealing with it does not render it amenable to the statutes governing corporations organized to carry on a distinctively "trust" business. *Latshaw v. Western Townsite Co*..... 575

13. CORPORATIONS—INSOLVENCY — CHATTEL MORTGAGES — AFFIDAVIT OF GOOD FAITH—CREDITORS—RECEIVERS. Rem. & Bal. Code, § 3660, providing that a chattel mortgage is void as against creditors of the mortgagor or subsequent purchaser, and incumbrancers in good faith, unless accompanied by the affidavit of the mortgagor that it is made without design to hinder, delay or defraud creditors, a chattel mortgage by a corporation without an affidavit of good faith is void as to a receiver for creditors, who was appointed on insolvency and took possession of the mortgaged property before the mortgagee or any person had acquired a valid lien thereon; as the property is a trust fund for creditors in *custodia legis*, and no creditor could thereafter obtain a preference over others. *Mutual Investment Co. v. Walton Machine Co*..... 298

14. CORPORATIONS—FOREIGN CORPORATIONS—POWER TO DEAL IN REAL ESTATE. Under Rem. & Bal. Code, § 3720, prohibiting foreign corporations "hereafter organized" from exercising the power of dealing in real estate, a foreign corporation organized before the enactment of the statute, but obtaining a certificate enabling it to transact business in the state after the date of the enactment of such section, has power to carry on such business in this state, the issuance of certificate of admission not constituting organization within the meaning of the statute. *Latshaw v. Western Townsite Co*..... 575

15. CORPORATIONS—FOREIGN CORPORATIONS—ACTS. The acts of a foreign corporation in excess of its powers as to dealing in real estate in contravention of Rem. & Bal. Code, § 3720, can be questioned only in a proper proceeding by the state. *Latshaw v. Western Townsite Co*..... 575

CORRECTION:

Of sheriff's return on execution, see EXECUTION.

COST BOND:

See APPEAL AND ERROR, 8.

COSTS:

On levy of reassessment for improvement, see MUNICIPAL CORPORATIONS, 16, 17.

1. COSTS — PARTIES LIABLE—TRUSTEE OF FUND—PREVAILING PARTY—APPORTIONMENT. In an action for an accounting of a fund of nearly $30,000, deposited with a trustee to be disbursed in the payment of

COSTS—CONTINUED.

labor and material claims, costs should not be awarded against the trustee, where it performed its duties in good faith, making errors only in minor particulars, and the plaintiff prevailed to the extent of only $122, upon a claimed balance of over $6,000. *Fidelity & Deposit Co. v. Spokane Merchants' Association*..... 170

2. COSTS—ON APPEAL FROM ASSESSMENT—TRANSCRIPT—STATUTES. 3 Rem. & Bal. Code, § 7892-22, authorizing costs for a transcript furnished by a city clerk on appeal from an assessment roll, does not permit the allowance of costs for a transcript furnished by a party. *Eggerth v. Spokane*..... 221

COUNTIES:

County or state officers, see GAME.
Mandamus to officers, see MANDAMUS.
Assessment of property for taxation, excessive tax, see TAXATION, 1-3.

1. COUNTIES—OFFICERS—COUNTY OR STATE—GAME COMMISSION AND WARDENS—STATUTES. The fact that the game code of 1913 (3 Rem. & Bal. Code, § 5395-1 *et seq.*) refers in the title and body of the act to "county game commissions" and "county game wardens," does not necessarily make them county officers, within Const., art. 11, § 5, requiring the legislature to provide for the election of county officers; and in view of the fact that they are appointed by and under the supervision of state officers, and may be transferred on official business "from one county to another," the legislature must have intended to make them state and not county officers. *State ex rel. Lopas v. Shagren*..... 48

2. COUNTIES—CLAIMS—PRESENTATION — SALARY OF GAME WARDEN — STATUTES. Claims for the salary of county game wardens must be presented to the county commissioners, under 3 Rem. & Bal. Code, § 5395-34, providing that all payments made under the game code shall be audited as are other claims against the county, and 2 Id., § 3918, providing that the county auditor shall audit all claims against the county and present the same to the county commissioners for allowance. *State ex rel. Beach v. Olsen*..... 56

3. SAME—CLAIMS AGAINST GAME FUND—POWERS OF COUNTY COMMISSIONERS—STATUTES. The game code (3 Rem. & Bal. Code, §§ 5395-2, 5395-34) having provided that the county game commission shall fix the salary of game wardens and pass upon the propriety of expenditures, the county commissioners, in the allowance of claims against the county game fund, cannot determine the salary or the propriety of the expenditures, but act in an administrative or ministerial capacity with the right only to reject illegal claims. *State ex rel. Beach v. Olsen*..... 56

COUNTY BOARD:

Mandamus to compel issuance of salary warrant for game wardens, see MANDAMUS.

COUNTY COMMISSIONERS:

Allowance of claims against county game fund, see COUNTIES, 3.
Parol evidence to show nature of meetings of, see EVIDENCE, 4.
Mandamus to compel issuance of salary warrant for game wardens, see MANDAMUS.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.
Judicial notice, see EVIDENCE, 1.
Proceedings in probate, see EXECUTORS AND ADMINISTRATORS.
Power to fix limits of assessment district, see MUNICIPAL CORPORATIONS, 6.
Sentence for crime, see PROSTITUTION.
Review of assessment of tax, see TAXATION, 3.
Province of court and jury, see TRIAL, 3.
Trial by court without jury, findings, see TRIAL, 6.
Equitable relief, see TRUSTS.

1. COURTS—PROBATE COURTS—JURISDICTION—JUDGMENTS—FULL FAITH AND CREDIT. Superior courts being courts of general jurisdiction exercising powers in probate, a decree awarding administration upon adjudging the death of the deceased must be accorded the same faith and credit as judgments in law or decrees in equity. *Wagner v. Alderson* 157

COVENANTS:

In insurance policies, see INSURANCE, 1, 2, 6-9.
Breach of, see VENDOR AND PURCHASER, 7.

CREDITORS:

Priority of claims against insolvent corporation, see CORPORATIONS, 13.
As party bound by decree in probate, see EXECUTORS AND ADMINISTRATORS, 4.
Placing funds beyond reach of creditors, see FRAUD, 1.
Conveyances in fraud of, see FRAUDULENT CONVEYANCES.
Subrogation to rights of creditor, see SUBROGATION.

CRIMINAL LAW:

See PERJURY; SEDUCTION.
Sentence for crime, see PROSTITUTION.

1. CRIMINAL LAW — FORMER JEOPARDY—IDENTITY OF OFFENSES—PARTICULAR DESCRIPTION. The dismissal of an information for stealing thirty sacks of "Hybrid" wheat, after jury sworn, does not bar the

CRIMINAL LAW—CONTINUED.

filing of a new information for stealing thirty sacks of "Jones Fife" wheat; since, while a particular description is unnecessary, if given, a variance is fatal, and a conviction of the one does not amount to conviction of the other. *State v. Wilson*..... 136

2. CRIMINAL LAW — TRIAL — CONDUCT OF JUDGE — COMMENT ON EVIDENCE. Where a witness for the defendant in a criminal prosecution, by means of a proper cross-examination by the prosecutor, had already been discredited for perjury in her testimony on a former trial relating to the same state of facts, the action of the court in further examining the witness to ascertain whether she was certain as to the nature of the testimony previously given and as to the nature and effect of her testimony in the pending trial would not constitute a comment on the evidence within the prohibition of Const., art. 4, § 16. *State v. Roberts*..... 560

3. CRIMINAL LAW—TRIAL—ARREST OF WITNESS FOR PERJURY. Where a witness admitted the falsity of her testimony on a former trial involving the same state of facts under examination in a pending trial, the conduct of the court in having such witness held to answer for a charge of perjury, during the absence of the jury from the court room, would not constitute prejudicial error. *State v. Roberts* 560

4. CRIMINAL LAW—TRIAL—URGING AGREEMENT OF JURY. The action of the judge in saying to a jury in a criminal case, which had been called in to inquire of their progress, that "the case is one of considerable importance and it would be some trouble to try it again, and if the jury can consistently, I would like them to agree" would not constitute error, since there was no intimation of his own or the public's opinion as to the merits of the case. *State v. Serwe* 516

5. CRIMINAL LAW — APPEAL — HARMLESS ERROR. Error in eliciting testimony impeaching a witness for the defense in a criminal prosecution is harmless, where the impeaching testimony was amply sustained by the other evidence in the record. *State v. Serwe*..... 516

CROPS:

Lien on crops, see AGRICULTURE.

CROSS-APPEALS:

See APPEAL AND ERROR, 14.

CROSS-EXAMINATION:

Of witnesses, see WITNESSES, 2.

CROSSINGS:

Accident at street crossing, see MUNICIPAL CORPORATIONS, 21-25.

DAMAGES:

See LIBEL AND SLANDER, 4, 5.
For torts of mandatary, see BAILMENT.
In civil action for injury to person through sale of liquor, see INTOXICATING LIQUORS, 4.
Claims for, see MUNICIPAL CORPORATIONS, 28-30.
Obstructions in streets, see MUNICIPAL CORPORATIONS, 30, 31.
Fires caused by operation of railroad, see RAILROADS, 7, 8.
Breach of contract for sale of goods, see SALES, 4.
For injury to trees, see TRESPASS.
Breach of contract for sale of land, see VENDOR AND PURCHASER, 13.

1. DAMAGES—EVIDENCE—SUFFICIENCY—NOMINAL DAMAGES. In an action for damages to a new concrete mixer, except the boiler and certain parts that were placed in a warehouse, evidence of the difference between the market value of the machine including the parts in the warehouse at the time it was taken, and its market value when returned, is insufficient to show the damage, or to entitle plaintiff to more than nominal damages, there being no evidence of the value as it stood at the time it was taken without the parts stored in the warehouse, or of the value of such parts, from which the damages might be ascertained. *Northwestern Equipment Co. v. Sofe* 118

2. DAMAGES—FLOODING LANDS—EXPENSES IN MINIMIZING—MEASURE. In an action for damages to land flooded, and for the expense of pumping to minimize the injury, the true measure of damages as to the pumping is the reasonable cost or value and not the amount disbursed. *Evergreen Farm v. Attalia Land Co.*..... 192

3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A recovery of $3,000 for injuries sustained by a child eight years of age, struck by a piece of ice falling from an ice wagon, is not excessive, where it appears that two bones of the leg were broken, the flesh badly cut, necessitating many stitches, and five weeks in the hospital, and resulting in an ugly scar and a reduced size of the leg. *Bowers v. Standard Fuel & Ice Co.*..... 400

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $2,500 for permanent personal injuries in the loosening or misplacement of the sacroiliac joint will not be set aside as excessive, where the extent of the injuries depends upon opinion evidence, and it cannot be said that the verdict reflects passion and prejudice as a matter of law. *Briglio v. Holt & Jeffery*..... 644

DEATH:

Jurisdiction to determine fact and time of, see EXECUTORS AND ADMINISTRATORS, 1.
Right of recovery against industrial insurance fund for death of employee shot by third person, see MASTER AND SERVANT, 1-8.
Wrongful death caused by operation of railroad, see RAILROADS, 1-6.

DEBT:

Payment of as fraud on creditors, see FRAUD, 1.
Liability of wife's separate property for community debt of husband, see HUSBAND AND WIFE, 4.
Loan indebtedness of insured at date of lapse of policy, see INSURANCE, 8.
Maturity of mortgage debt, see MORTGAGES, 1.
Tender of mortgage debt, see MORTGAGES, 2, 3.

DEBTOR AND CREDITOR:

See FRAUDULENT CONVEYANCES.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECISION:

On appeal, see APPEAL AND ERROR, 26.
On appeal, modification of judgment, see JUDGMENT, 1.

DEDICATION:

Condemnation of state land dedicated as water way, see EMINENT DOMAIN, 1-3.

DEEDS:

Performance of contract for by tender of certificate for burial crypt, see CEMETERIES, 2.
Admissibility of in action to quiet title, see QUIETING TITLE.
In trust, see TRUSTS.
Time for delivery, see VENDOR AND PURCHASER, 10, 11.
Demand for, see VENDOR AND PURCHASER, 12.

DEFAMATION:

See LIBEL AND SLANDER.

DEFAULT:

Of vendee of conditional sale contract, see SALES, 7, 8.
By vendee as waiver of right to rescind, see VENDOR AND PURCHASER, 5.

DEFECT:

In machinery or appliances, see MASTER AND SERVANT, 11-14, 17.
In title of vendor, see VENDOR AND PURCHASER, 8, 9.

DE JURE OFFICERS:

Right of salary, see OFFICERS.

DELAY:

In presenting check for payment, see BILLS AND NOTES, 3.
In use of dedicated water way as affecting right to condemn same, see EMINENT DOMAIN, 2.
In rescission of contract by vendee, see VENDOR AND PURCHASER, 4.

DELIVERY:

Of property held by sheriff as working cessation of controversy, see APPEAL AND ERROR, 3.
On sale of goods, see SALES, 1, 3, 6.
Of deed, time for, see VENDOR AND PURCHASER, 10, 11.

DEMAND:

For jury trial, waiver, see JURY.
For deed, time for, see VENDOR AND PURCHASER, 12.

DEMURRER:

In pleading, see PLEADING, 4.

DEPARTURE:

Of servant from scope of employment as question for jury, see MASTER AND SERVANT, 21.

DEPOSITS IN COURT:

See TENDER.

DESCRIPTION:

In information, of property stolen, see CRIMINAL LAW, 1.
In notice of establishment of irrigation district, see WATERS AND WATER COURSES, 5, 6.

DIRECTING JUDGMENT:

In civil action, see TRIAL, 3.

DISCHARGE:

Of lien by tender, see MORTGAGES, 2.

DISCRETION OF COURT:

Denial of new trial, see NEW TRIAL.
Amendment of pleading, see PLEADING, 2-4.
Sentence for crime, see PROSTITUTION.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 8, 9, 11, 16.
Dismissal of action as prematurely brought, see MORTGAGES, 1.
Nonsuit on ground of variance, see PLEADING, 6.
At trial, see TRIAL, 7.

1. DISMISSAL AND NONSUIT — GROUNDS — EFFECT ON COUNTERCLAIMS. Judgment on appeal directing the dismissal of the action because of an agreement for arbitration of the dispute carries with it the dismissal of defendant's counterclaims, without prejudice; since the ground of the dismissal obviously went to the whole controversy. *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co*..... 662

DISSOLUTION:

Of partnership, see PARTNERSHIP.

DISTRICTS:

Local improvement districts, reassessments, see JUDGMENT, 3.
Assessment districts, see MUNICIPAL CORPORATIONS, 6, 10.
Irrigation districts, see WATERS AND WATER COURSES, 5-10.

DIVERSION:

Of water course; see WATERS AND WATER COURSES, 2.

DIVORCE:

Conveyances pending divorce proceedings, see FRAUDULENT CONVEYANCES.
Divorce to husband in action for separate maintenance, see HUSBAND AND WIFE, 5.

DOCUMENTS:

As evidence in civil actions, see EVIDENCE, 3, 9.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW.

EASEMENTS:

Water rights, see WATERS AND WATER COURSES, 2.

EJECTMENT:

Modification of judgment after remand on appeal, see JUDGMENT, 1.

ELECTION OF REMEDIES:

See TROVER AND CONVERSION, 1.
On default of vendee in conditional sale contract, see SALES, 8.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 6-8.

1. EMINENT DOMAIN—PROPERTY SUBJECT—STATE LANDS—TIDE LANDS—DEVOTION TO PUBLIC USE—WATER WAYS—STATUTES. Rem. & Bal. Code, § 8740, authorizing railroad corporations to condemn land and any interest in land including lands granted to the state and also tide and shore lands belonging to the state, refers to state lands held in a proprietary capacity only, and does not include state lands segregated from the public domain and appropriated to a public use by due dedication as a water way by virtue of Id., §§ 8092-8099, relating to harbor areas and water ways across the same. *State v. Superior Court* 454

2. SAME. The fact that such dedicated water way had never been improved or used by the public, after a lapse of twenty-five years, does not affect its segregation from the general mass of the state's land or render it subject to condemnation; as such delay does not operate against the state. *State v. Superior Court*..... 454

EMINENT DOMAIN—CONTINUED.

3. SAME—CONDEMNATION — PARTIES — OBJECTION BY STATE. Upon a railroad's condemnation of city streets, the city can convey no rights as against the state by defaulting, and the state has sufficient interest to appear and contest the appropriation as against petitioners without right. *State v. Superior Court*..... 454

4. EMINENT DOMAIN—PERSONS ENTITLED — CONTRACT RIGHTS — PRIVATE WAY OF NECESSITY—STATUTES. A private way of necessity for a logging road may be condemned although the petitioner already has a lease thereof for as long a term as may be required, under 3 Rem. & Bal. Code, § 5857-1, making the right to condemn depend merely upon whether one has land so situated with reference to the land of another that it is necessary for its proper use and enjoyment to have a private way of necessity, without reference to any contract rights. *State ex rel. Preston Mill Co. v. Superior Court*... 249

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT:

See COMMERCE, 2.

EQUALIZATION:

Of taxes, see TAXATION, 3.

EQUITY:

See FRAUDULENT CONVEYANCES; QUIETING TITLE; SPECIFIC PERFORMANCE; TRUSTS.
Equitable estoppel, see ESTOPPEL.
Necessity for findings in equity case, see TRIAL, 6.

ESTABLISHMENT:

Of highways, see HIGHWAYS.
Of irrigation district, see WATERS AND WATER COURSES, 5-10.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

Of principal to deny authority of broker, see BROKERS, 1.
To deny agency, see CORPORATIONS, 10.
Of wife to assert separate character of property, see HUSBAND AND WIFE, 1.
To question validity of policy, see INSURANCE, 5.
By judgment, see JUDGMENT, 2, 3.
Of contractor to claim fund retained by city under contract, see MUNICIPAL CORPORATIONS, 5.
Of principal to dispute agency, see PRINCIPAL AND AGENT, 3.

ESTOPPEL—CONTINUED.

1. ESTOPPEL—ELEMENTS—KNOWLEDGE—ACQUIESCENCE. A director induced to purchase stock in a corporation through fraud is not charged with knowledge of the fraud or estopped to defend an action upon a note for the purchase price, from the fact that he was present at a board meeting at which a resolution was adopted authorizing the transfer of assets of the company as might seem consistent with the best interests of the company, under which resolution the note passed with other assets, he having no knowledge that his note had passed to the company and no specific assets being considered. *Gates v. Gregory* 151

EVIDENCE:

See ADVERSE POSSESSION, 1; DAMAGES, 1; NEGLIGENCE, 2, 5; PAYMENT; QUIETING TITLE.
Objections for purpose of review, see APPEAL AND ERROR, 4, 5.
Harmless error in rulings on, see APPEAL AND ERROR, 20-22; CRIMINAL LAW, 5.
For personal injuries, see CARRIERS, 2; RAILROADS, 4, 5.
Fraud in sale of stock, see CORPORATIONS, 1, 4, 6.
Of agency, see CORPORATIONS, 11.
Comment on by judge, see CRIMINAL LAW, 2; TRIAL, 5.
For specific performance of contract for trade of properties, see EXCHANGE OF PROPERTY, 1.
To show fraud in exchange of properties, see EXCHANGE OF PROPERTY, 2, 3, 7-10.
Of fraud, sufficiency, see FRAUD.
Separate character of property, see HUSBAND AND WIFE, 3.
In civil action for damages through sale of liquor, see INTOXICATING LIQUORS, 2, 3.
For injuries to servant in general, see MASTER AND SERVANT, 12, 13, 20.
For personal injuries, see MUNICIPAL CORPORATIONS, 23.
Negligence of physician, see PHYSICIANS AND SURGEONS, 1.
In action for damages from fire, see RAILROADS, 7.
To show prospective profits, on breach of contract, see SALES, 4.
Breach of warranty, see SALES, 5.
Of unchastity, see SEDUCTION.
Reception at trial, see TRIAL, 1, 2.
Value of property converted, see TROVER AND CONVERSION, 2.
Rescission of contract by purchaser, see VENDOR AND PURCHASER, 3.
Testamentary capacity, see WILLS, 3, 4.
Execution and attestation of will, see WILLS, 5.
Testimony of witnesses, see WITNESSES.

1. EVIDENCE — JUDICIAL NOTICE — GOVERNMENT SURVEY. The courts judicially know the manner in which government surveys are ex-

EVIDENCE—CONTINUED.

tended over public lands, and approximately the location of the base and meridian lines. *In re Wenatchee Reclamation District* 60

2. EVIDENCE—RES GESTAE—ADMISSIBILITY. In an action against defendants for negligently communicating fire to plaintiffs' premises, evidence that simultaneously with the fire, one of the defendants stated: "I have got an awful fire—the fire got away from me," was admissible as part of the *res gestae*, whether or not defendant or his men had caused the fire, and whether or not they had tried to put it out. *McCann v. Chicago, Milwaukee & Puget Sound R. Co.*..... 626

3. EVIDENCE—DOCUMENTARY EVIDENCE—IDENTIFICATION. In an action to recover for legal services, an alleged written agreement of settlement of a cause conducted for defendant, which was not sued upon directly, was sufficiently identified to permit of its introduction in evidence, without identification of signatures, where the attorney testified it was the final agreement made by him on behalf of defendant and the adverse parties to the suit, and where the attorneys for the adverse parties also generally identified it in their depositions. *Palmer v. Parker*..... 683

4. EVIDENCE — MEETINGS OF COUNTY BOARD — ADJOURNMENTS—PAROL EVIDENCE. It may be shown by the testimony of the clerk that the meetings of the board of county commissioners were adjournments of a regular meeting to designated days, although not so entered in the minutes. *In re Wenatchee Reclamation District*..... 60

5. EVIDENCE—PAROL TO VARY WRITING—ADMISSIBILITY. Evidence of an oral agreement contradicting a clause in a written contract that the parties had investigated the properties to be exchanged, is admissible in an action for rescission, upon an allegation of fraud in procuring the contract, and to show that the contract actually entered into was fraudulent and void. *Gordon v. Hillman*..... 490

6. EVIDENCE—ORAL EVIDENCE—TO VARY WRITING—INDORSEMENT ON NOTE. Oral evidence is inadmissible to vary the legal effect of an indorsement on a note by showing an agreement between indorser and indorsee that it was to be indorsed without recourse. *Holt Mfg. Co. v. Brotherton*..... 354

7. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING — CHATTEL MORTGAGES—DEBT SECURED. In the absence of fraud or mistake, a chattel mortgage stating that it was given to secure a note described therein cannot be modified by a previous or contemporaneous oral agreement to the effect that such note was taken in lieu of cash and was not to be secured by the mortgage. *Holt Mfg. Co. v. Brotherton*.. 354

8. EVIDENCE—PAROL EVIDENCE—BILLS AND NOTES—CONDITIONS SUBSEQUENT. In the absence of fraud, a contemporaneous oral agreement providing for the surrender of a promissory note upon the execution by the promisor of a will making the payee a legatee to

EVIDENCE—CONTINUED.

the extent of the face value of the note cannot be shown as a defense to an action upon the note. *Post v. Tamm*..... 504

9. EVIDENCE — FORMER TRIAL — IDENTITY OF PARTIES AND ISSUES — STATUTES. Evidence given at a former trial in an action upon a note by a holder in due course is not admissible in a subsequent action by the maker against the payee for fraud in its procurement, under Rem. & Bal. Code, § 1247, authorizing the use of a certified copy of the testimony of an absent witness given at a former trial of the same cause, in any civil action between the same parties relating to the same matter. *Duffy v. Blake*..... 140

10. SAME — FORMER TRIAL — PARTIES — PRIVITY. The fact that two parties in two different suits were interested in proving or disproving the same facts creates no privity between them; as the ground of privity is property and not personal relation. *Duffy v. Blake* 140

11. SAME—FORMER TRIAL—IDENTITY OF ISSUES. There is no identity of issues in two actions, so as to make testimony at the former trial inadmissible in the other, where in the first action, upon a promissory note, the only issue was whether plaintiff was a holder in due course, making the question of fraud in its procurement immaterial, and the second action was by defendant in the former, for damages for the fraud of the payee. *Duffy v. Blake*..... 140

12. SAME—FORMER TRIAL—NOTES OF TESTIMONY. The stenographer's evidence as to the testimony of an absent witness, given at a former trial, is inadmissible where the witness did not refresh her memory from her shorthand notes, but read directly from a transcript of the notes made by herself or dictated to a phonograph. *Duffy v. Blake* 140

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 6.

EXCESSIVE DAMAGES:

See DAMAGES, 3, 4.

In action by wife for injury through causing intoxication of husband, see INTOXICATING LIQUORS, 4.

For slander, see LIBEL AND SLANDER, 5.

EXCESSIVE SENTENCE:

See PROSTITUTION.

EXCESSIVE TAX:

See TAXATION, 1-3.

EXCHANGE OF PROPERTY:

Fraud as inducing trade of lands, see FRAUD, 2.
Enforcing contract for, see SPECIFIC PERFORMANCE.
Venue of action for rescission of trade of lands, see VENUE.

1. EXCHANGE OF PROPERTIES—RESCISSION—ACTING ON VERBAL RESCISSION—EVIDENCE—SUFFICIENCY. Plaintiffs are not entitled to specific performance of a contract for the exchange of properties free of incumbrances, where they were unable to remove tax liens from their property, while defendants were ready and able to make the exchange, and thereupon the contract was verbally rescinded, the defendants rented plaintiffs' property and paid monthly rent thereon and made improvements upon their own property and were thereafter unwilling to make the exchange; since the conduct of plaintiffs may be shown in defense, even if the verbal rescission was of no effect. *Stoner v. Fryett*..... 89

2. EXCHANGE OF PROPERTY—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. A judgment for rescission of an exchange of properties is sustained where it appears that plaintiff was grossly overreached by false representations, that notes given for a face value of $47,000, as part consideration, were practically worthless, that, though the contract recited that both parties had examined the properties and were satisfied, the complainant understood it as a tentative agreement, under which he would have an opportunity to investigate titles and securities and he offered to rescind within two weeks, as soon as his investigation had disclosed the unconscionable nature of the transaction. *Gordon v. Hillman*..... 940

3. EXCHANGE OF PROPERTIES—FRAUD—EVIDENCE—SUFFICIENCY. A mortgage for $4,250, included as part consideration for an exchange of properties, and represented by defendant to be bankable and as good as cash, is shown to have been in bad faith, where it appears that the mortgaged property, standing in the name of defendant's wife, was worth from $1,600 to $2,000, with a loan value of $600 was listed by defendant for sale at $3,200 and the notes and mortgage given to defendant the following day, and indorsed without recourse, and was not recorded until four months later, about two weeks before the trade, and an alleged grantee of the land never recorded his deed or paid any interest. *Soboda v. Nolf & Co*.... 446

4. SAME—FRAUD—MISREPRESENTATIONS—RELIANCE UPON. On an exchange of properties, a party living in Iowa, whose agent lived in Oregon, may rely on representations, made to induce the trade, that a real estate mortgage on property in this state, fair on its face, was in good faith, and readily convertible into cash; the same being statements of fact known to be untrue. *Soboda v. Nolf & Co*.... 446

5. SAME—RESCISSION—PARTIAL—DIVISIBLE CONTRACT. Where consideration for an exchange of properties was divided into distinct items, and included a note and real estate mortgage for $4,250, the

EXCHANGE OF PROPERTY—CONTINUED.

consideration is divisible, and partial rescission may be granted where such item was not according to representations inducing the trade. *Soboda v. Nolf & Co* 446

6. EXCHANGE OF PROPERTY—RESCISSION—MISREPRESENTATIONS — RELIANCE. Where plaintiff, in an action for the rescission of a trade of land for fraud, knew that representations in a memorandum describing the land were not literally accurate, he cannot be heard to say that he relied upon them as being literally accurate. *Wilson v. Mills* 71

7. SAME—FRAUD—EVIDENCE—SUFFICIENCY. In an action for the rescission of a trade of lands, a rough sketch as to the course of a river cannot be made the basis of actionable fraud, where it was hastily made and only intended to represent the general course of the river and must have been so understood. *Wilson v. Mills*.... 71

8. SAME. Misrepresentations as to the boundaries of a tract of land do not warrant a rescission, where a line was merely indicated from a distance without any attempt to point out its exact location, and no shortage was claimed. *Wilson v. Mills*..... 71

9. SAME. In an action for rescission of a trade of lands, the burden being upon the plaintiff to establish fraud in misrepresenting the amount of bottom land in the tract, he is not entitled to recover upon a showing that two surveys were made which were directly conflicting and one showed the truth of the representations. *Wilson v. Mills*..... 71

10. SAME. A rescission of a trade of lands for fraud in misrepresenting the character of the land is properly denied, where the evidence as to the misrepresentations respecting the quality of the land were directly conflicting, plaintiff examined the land, no artifice was exerted reasonably calculated to prevent further examination, and the parties dealt at arm's length and put in their respective properties at inflated trading prices. *Wilson v. Mills*..... 71

EXECUTION:

Wrongful execution, see SHERIFFS AND CONSTABLES.
Of will, see WILLS, 4, 5.

1. EXECUTION—RETURN—CORRECTION—REMEDIES OF SHERIFF. A sheriff cannot maintain a civil action to correct his erroneous return on execution, which showed he had received a larger sum than the actual amount, his remedy being by motion in the original cause; nor can such action be treated as the equivalent of a motion. *Toner v. Page* 314

EXECUTORS AND ADMINISTRATORS:

Courts of probate, see COURTS.

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT — DECREE — JURISDICTION—FACT OF DEATH—DETERMINATION. Upon issuing letters of

EXECUTORS AND ADMINISTRATORS—CONTINUED.

administration upon petition under the regular procedure, the court has jurisdiction to determine both the fact and time of the death of the deceased. *Wagner v. Alderson*..... 157

2. EXECUTORS AND ADMINISTRATORS — APPOINTMENT — DECREE — CONCLUSIVENESS—PRESUMPTIONS—FACT OF DEATH. A decree upon issuing letters of administration, adjudging the fact and time of death, is *prima facie* proof of the facts determined, in a subsequent action in which the administrator defends in his representative capacity. *Wagner v. Alderson*..... 157

3. SAME. Such a decree, reciting that it was entered upon proof taken, is not based upon any presumption of death from continued absence; and the evidence not being in the record and no appeal taken, the correctness of the judgment cannot be inquired into. *Wagner v. Alderson*..... 157

4. SAME—APPOINTMENT—DECREE— CONCLUSIVENESS — FACT OF DEATH —PARTIES BOUND—CREDITORS. A creditor of an estate, as to whom notice to creditors was published, is so far a party to the probate proceedings as to be bound by the decree adjudging the fact and time of the death of the deceased, especially where he had filed a claim against the estate and the same had been allowed. *Wagner v. Alderson* 157

5. EXECUTORS AND ADMINISTRATORS—DE BONIS NON—POWERS—ACTION OF UNLAWFUL DETAINER. On the death of a husband serving as an executor for his deceased wife's one-half of the community estate, the right of action against a tenant for unlawful detainer passes to the administrator *de bonis non* of the community estate and not to the administrator of the deceased executor. *Griffith v. James*... 607

6. EXECUTORS AND ADMINISTRATORS—POWERS AS AGAINST HEIRS. Actions to recover both real and personal property may be maintained by an executor or administrator even against those claiming the property as heirs or devisees. *Griffith v. James*..... 607

EXEMPTIONS:

Of negligence by contract for water supply, see WATERS AND WATER COURSES, 3.

EXPENSES:

Of minimizing damage to lands flooded, measure, see DAMAGES, 2.

EXPLOSIVES:

1. EXPLOSIVES—BLASTING IN STREET—DEGREE OF CARE. Where blasting powder or dynamite is used in the prosecution of street work, the contractor is bound to use "every reasonable effort for the prevention of injury. *Briglio v. Holt & Jeffery*..... 644

EXTENSION:

Automatic extension of insurance on lapse of policy, see INSURANCE, 6-9.

Of street over tide lands, abandonment of right, see MUNICIPAL CORPORATIONS, 19.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 12, 13.

FALSE SWEARING:

See PERJURY.

FEES:

Attorney's fees, see GARNISHMENT.

Of attorney in foreclosure suit, see MORTGAGES, 3.

FELLOW SERVANTS:

See MASTER AND SERVANT, 14, 16.

FIDELITY INSURANCE:

See INSURANCE, 3.

FILING:

Claims against city for damages, see MUNICIPAL CORPORATIONS, 28-30.

Claims against contractor's bond, waiver of requirement, see PRINCIPAL AND SURETY.

Conditional sales contract, see SALES, 6.

FINAL JUDGMENT:

See CERTIORARI.

Appealability, see APPEAL AND ERROR, 2.

FINDINGS:

Review of on appeal, see APPEAL AND ERROR, 18.

By court in civil actions, see TRIAL, 6.

FIRE INSURANCE:

See INSURANCE, 10.

FIRES:

See RAILROADS, 7, 8.

FIXTURES:

1. FIXTURES—TENANT — HOTEL EQUIPMENT — ATTACHMENT TO BUILDING. The law of fixtures applies as between tenant and landlord, where tenants installed window shades attached to the building in the ordinary manner, towel hangers actually attached with screws, and medicine cabinets attached by boring holes in the wall and putting in a block to which the chests were attached by screws. *Donahue v. Hardman Estate*..... 125

FIXTURES—CONTINUED.

2. FIXTURES—SALE—BILL OF SALE—RESERVATIONS OF TITLE. A bill of sale of hotel furnishings made by the owner of the hotel, reciting that it is understood that the sale does not affect the title to "any fixtures attached to the building," accompanied by a receipt stating that the owner retains title to specified equipment "and any other fixtures attached to the building," shows clearly that the owner reserved title to the fixtures attached to the building. *Donahue v. Hardman Estate* 125

3. FIXTURES—TENANT—RIGHT OF REMOVAL—SURRENDER. An assignee of the tenant must exercise the right to remove trade fixtures before surrendering the lease. *Donahue v. Hardman Estate*..... 125

4. SAME—MORTGAGEE OF TENANT—RIGHT OF REMOVAL. After surrender of the premises by the tenant, a mortgagee of trade fixtures cannot remove them. *Donahue v. Hardman Estate*..... 125

FORECLOSURE:

Of farm laborer's lien, see AGRICULTURE.
Of mortgage, see MORTGAGES.
Of lien for local assessments, see STATUTES, 3-5.

FOREIGN CORPORATIONS:

See CORPORATIONS, 14, 15.

FORFEITURE:

Of insurance, see INSURANCE, 9.
Of lien by refusal of tender, see MORTGAGES, 2.
Of right to rescind contract, see VENDOR AND PURCHASER, 4-6.

FORMER ADJUDICATION:

See JUDGMENT, 2, 3.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW, 1.

FORTUITOUS EVENT:

Cause of injury to servant, see MASTER AND SERVANT, 1, 3, 5-7.

FRANCHISE:

For street railway, see STREET RAILROADS.

FRAUD:

See BILLS AND NOTES, 4; FRAUDULENT CONVEYANCES.
In sale of corporate stock, see CORPORATIONS, 1, 3-7.
Parol evidence to show procuring of contract by fraud, see EVIDENCE, 5.
In trade of property, see EXCHANGE OF PROPERTY, 2-10.
In application for life insurance policy, see INSURANCE, 4, 5.

FRAUD—CONTINUED.

Agent, see PRINCIPAL AND AGENT, 1.
Assessment of property for taxation, see TAXATION, 1-2.
Sales of realty, see VENDOR AND PURCHASER, 1.

1. FRAUD—MONEY RECEIVED—PAYMENT OF DEBT—FRAUD UPON CREDITORS—EVIDENCE—SUFFICIENCY. In an action to trace and recover funds placed by judgment debtors beyond the reach of creditors, findings that the debtors made payments and assigned stock without consideration in fraud of creditors are not sustained, where plaintiffs were obliged to depend upon the testimony of the defendants, which tended to show a consideration in the settlement of past debts and there was no evidence of bad faith except from the inferences arising from the relationship of the parties, and the assignee of the stock purchased in good faith without notice of the fraud; as clear and convincing evidence of the fraud is necessary. *Smith v. Doty* 315

2. FRAUD—MISREPRESENTATIONS—DUTY TO INVESTIGATE — EVIDENCE — SUFFICIENCY. Recovery for fraud in a trade in misrepresenting an orchard tract is not warranted where it appears that, upon request for a report, the tenant's wife made out answers to inquiries submitted, the defendant disclaimed knowledge thereof, and merely submitted the report for what it was worth; especially where each party to the trade undertook to make his own investigation and the exchange was made after the time for the investigation had elapsed and each had expressed himself as ready to make the exchange; the property being at hand where it might have been investigated. *Parker v. Brainard* 428

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—RIGHTS OF PARTIES— EQUITY — QUIETING TITLE. Where, pending divorce proceedings, the wife made no claim to certain property purchased by the defendant husband and there was no evidence that the same was concealed from her, the fact that he took title in the name of another to avoid future complications concerning the title does not show such a fraud upon the wife as to prevent equity from granting the plaintiff relief in an action to quiet his title. *Anderson v. Hall* 376

FULL FAITH AND CREDIT:

See COURTS.

FUNDS:

Retention of for purpose of paying claims against contractor, see MUNICIPAL CORPORATIONS, 3, 5.

GAME:

County game commissions and wardens, see COUNTIES.
Mandamus to compel issuance of salary warrant for game wardens, see MANDAMUS.

GAME—CONTINUED.

1. GAME—OFFICERS—COUNTY OR STATE—COMMISSIONS AND WARDENS—STATUTES. The functions of the county game commissions and county game wardens, being the protection and propagation of game birds, animals and fish, the title to which is in the state and the protection of which is within the police power of the state, and their functions not relating exclusively to matters of local concern, the county game commissions and wardens are state and not county officers, within Const., art. 11, § 5, requiring the legislature to provide for the election of county officers; hence the game code (3 Rem. & Bal. Code, § 5395-2) providing for their appointment is constitutional. *State ex rel. Lopas v. Shagren*..... 48

GARNISHMENT:

Directing judgment, see TRIAL, 3.

1. GARNISHMENT—JUDGMENT — ATTORNEY'S FEES—STATUTES. Under Rem. & Bal. Code, § 704, allowing costs and reasonable attorney's fees against plaintiff to a garnishee who is discharged upon his answer, and against defendant if the garnishee is held, with costs to abide the result if the answer is controverted, attorney's fees are properly allowed against plaintiff where the answer was controverted and the court found substantially in accordance with the answers. *Puget Sound Iron & Steel Works v. First International Bank*..... 109

GOVERNMENTAL AGENCY:

Negligence of governmental agent, see MUNICIPAL CORPORATIONS, 31.

GRANTS:

Of public lands, see PUBLIC LANDS, 1.

GUARANTY:

See PRINCIPAL AND SURETY.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 19-25.
In criminal prosecution, see CRIMINAL LAW, 5.

HIGHWAYS:

Accidents at railroad crossings, see RAILROADS, 1-6.

1. HIGHWAYS — ESTABLISHMENT — USER. A permissive use by the public of a private way, lacking in the elements of use under a claim of right and of use adverse to the owners, does not ripen into a public right, no matter how long the use may have continued. *Spokane v. Great Northern R. Co*..... 613

HOMESTEAD:

Acquisition by Indians, see INDIANS.
Title to, time of passing, see PUBLIC LANDS.

HUSBAND AND WIFE:

Civil action by wife for damages through sale of liquor to husband, see INTOXICATING LIQUORS.

Admissions in pleading as to capacity to sue without joining wife, see PLEADING, 1.

1. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—TITLE—ESTOPPEL—IN PAIS. A married woman holding separate property standing in her own name is not estopped to assert title thereto from the fact that her husband, in obtaining a loan, made a financial statement to the bank including her property as property which "we own," where, upon request, she refused to sign the statement, the husband had other property, and the bank did not rely wholly upon the statement; as there was no active participation by her, and the bank was bound to notice her record title. *Glaze v. Pullman State Bank*.. 187

2. SAME—WIFE'S SEPARATE PROPERTY—IMPROVEMENTS. The placing of improvements on the wife's separate property after marriage does not make it community property, where the wife paid for the improvements with her separate funds. *Glaze v. Pullman State Bank* 187

3. SAME—COMMUNITY PROPERTY—EVIDENCE. The fact that a husband joined in a mortgage upon the wife's separate property is not conclusive evidence that the same was community property. *Glaze v. Pullman State Bank*..... 187

4. SAME—WIFE'S SEPARATE PROPERTY—COMMUNITY DEBTS. The wife's separate property is not liable for the community debt of her husband. *Glaze v. Pullman State Bank*..... 187

5. HUSBAND AND WIFE—SEPARATE MAINTENANCE — ACTION — DIVORCE. In a wife's action for separate maintenance it is error to deny the husband's cross-complaint for a divorce, where it appears that the wife was guilty of a fault that had not been condoned and that entitled him to a divorce under the statute. *Hawley v. Hawley*.... 646

ICE:

Injury to child struck by ice falling from delivery wagon, see MUNICIPAL CORPORATIONS, 26, 27.

Injury to person caused by snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 30, 31.

IDENTIFICATION:

Of document for purpose of evidence, see EVIDENCE, 3.

IDENTITY:

Of offenses as affecting former jeopardy, see CRIMINAL LAW, 1.

Of parties and issues at former trial, see EVIDENCE, 9-11.

IMPEACHMENT:

Of witness, see WITNESSES, 2, 3.

IMPROVEMENTS:

On wife's separate property, effect, see HUSBAND AND WIFE, 2.
Public improvements, see MUNICIPAL CORPORATIONS, 3-18.

INCORPORATION:

See MUNICIPAL CORPORATIONS, 1.

INDEMNITY:

See PRINCIPAL AND SURETY.
Insurance, see INSURANCE, 2, 3.

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 22.

INDIANS:

1. INDIANS—ACQUISITION OF HOMESTEAD—LIMITATIONS ON ALIENATION —STATUTES. The act of 1884 (23 St. at L. 96) providing that all patents for homesteads selected by such Indians "as may now be located on public lands, or as may . . . hereafter so locate," shall limit the power of alienation for the period of twenty-five years, is intended to supplement and modify the act of 1875 (18 Id., p. 420) providing that the title to lands acquired by Indians under the homestead laws shall not be alienated for a period of five years; and the same applies to lands for which final proof was not made at the time the act of 1884 was passed, although the right had matured. *Robinson v. Steele*..... 268

2. SAME—LIMITATION ON ALIENATION—EXTENSION — POWER OF CONGRESS. Congress has power to extend the period of limitation upon the power of alienation of Indian homesteads, between the time of making the original entry and the perfection of title by final proof. *Robinson v. Steele*..... 268

3. SAME—LIMITATION ON ALIENATION—REMOVAL—JUDGMENT QUIETING TITLE—VALIDITY. Where Indians alienated their homesteads prior to the expiration of the twenty-five years limiting their power to do so, a default judgment quieting the title as against the Indians, upon service by publication, is ineffective, since it is not binding upon the United States, which holds title in trust for the sole use of the Indians, under the express provisions of the act of 1884 (23 St. at L. 96). *Robinson v. Steele*..... 268

INDICTMENT AND INFORMATION:

Description of property stolen as bar to second prosecution, see CRIMINAL LAW, 1.

INDORSEMENT:

Parol evidence to vary legal effect of on note, see EVIDENCE, 6.

INDUSTRIAL INSURANCE:

Liability of employers for premiums, see COMMERCE.
Act as violating due process clause of constitution, see CONSTITUTIONAL LAW.
Application and scope of act, see MASTER AND SERVANT, 1-9.

IN PAIS:

Estoppel of wife to assert separate character of property, see HUSBAND AND WIFE, 1.

INSOLVENCY:

Of corporation, see CORPORATIONS, 13.

INSPECTION:

Of machinery under factory act, see MASTER AND SERVANT, 12.

INSTRUCTIONS:

Exceptions for purpose of review, see APPEAL AND ERROR, 6.
Harmless error in giving or refusing, see APPEAL AND ERROR, 23-25.
In civil actions, see TRIAL, 4, 5.

INSURANCE:

Industrial insurance act, scope of, see MASTER AND SERVANT, 1-9.
Title and subject of insurance code, see STATUTES, 2.

1. INSURANCE — POLICY — CONSTRUCTION. An ambiguous or complex clause in an insurance policy difficult for a layman to understand is to be construed in favor of the insured. *Algoe v. Pacific Mutual Life Insurance Co*..... 324

2. INSURANCE—INDEMNITY POLICY—CONSTRUCTION — BREACH OF CONDITIONS BY ASSURED. A condition in an automobile indemnity policy to the effect that the assured shall "not interfere in negotiations for compromise" between the company and any claimant against the assured for injuries, is not breached by the action of the assured in mentioning to the latter the fact of his insurance, and that the lawyer who would call upon him represented the insurance company and not the assured. *Hopkins v. American Fidelity Co*..... 680

3. INSURANCE—FIDELITY INSURANCE—BOND—CONSTRUCTION — ACTIONS —FAILURE OF PROOF. An indemnity bond insuring the fidelity of certain employees named in a schedule is in legal effect a separate bond as to each, and in no sense a blanket bond, where the limit of liability is separately stated at varying sums as to each employee and it is provided that the previously known dishonesty of an employee is a ground of defense, terminates the liability as to subsequent acts, fully earns the premiums paid, and requires the insured

INSURANCE—CONTINUED

to render assistance in bringing the employee to justice; hence an action on the bond for loss by theft must fail where plaintiff is able to prove only that the theft was committed by one or more of three employees, and is unable to show which one was guilty. *American Savings Bank & Trust Co. v. National Surety Co*..... 307

4. INSURANCE—AVOIDANCE OF POLICY FOR MISREPRESENTATION. A legal presumption of implied deceit arises, within 3 Rem. & Bal. Code, § 6059-34, providing that no misrepresentation or warranty made in the negotiation of a contract or policy of insurance shall be deemed material or defeat the policy, unless it is made "with intent to deceive," where an applicant for a life insurance policy, as an inducement to its issuance, stated in his application that he had had no disease since childhood, that he was in good health, and had not consulted a physician in the last five years, when in fact he was suffering from syphilis, and had received medical treatment therefor from a physician less than a month prior to the date of his application for a policy. *Quinn v. Mutual Life Insurance Co*..... 543

5. INSURANCE — ESTOPPEL TO AVOID POLICY — KNOWLEDGE OF AGENT. Where, previous to taking out a policy of life insurance, the applicant told the authorized agent of the insurance company that he was afflicted with some ailment, for which he had been treated by a doctor, but the nature of which was not disclosed, to which the agent replied that the applicant did not appear to have anything the matter with him, the agent was without such knowledge of the exact nature or condition of the applicant's health as was sufficient to impute knowledge to the company, estopping it from questioning the validity of the policy. *Quinn v. Mutual Life Insurance Co*.. 543

6. INSURANCE—LIFE INSURANCE—LAPSE—AUTOMATIC EXTENSION—RESERVE—APPLICATION—LOAN. Under a policy of life insurance providing that, after it had been in force three full years, should it lapse, the full amount of the policy at date of lapse, after payment of indebtedness, will be extended without request or demand therefor as nonparticipating term insurance, the insured when he could not pay the premiums had a right to rely upon the reserve fund for automatic extension of his insurance for such time as the surplus would buy; and when, at the time of his death, the insurer had in its hands a reserve to the credit of the insured sufficient to repay a loan and purchase the full amount of nonparticipating term insurance upon the life of the insured to that time, such term insurance was in full force. *Algoe v. Pacific Mutual Life Insurance Co*.... 324

7. SAME—EXTENSION—CONDITION PRECEDENT—LOAN PROVISIONS—APPLICATION OF RESERVE. In such a case, where the insured had obtained a loan, repayment of the loan is not a condition precedent to the right to set off against his loan the reserve value of the policy and have the remainder applied to the purchase of extended insur-

INSURANCE—CONTINUED.

ance, in view of the loan provision of the policy which declared that "any indebtedness . . . shall be first deducted in any settlement of this policy," which negatives the idea of such condition precedent. *Algoe v. Pacific Mutual Life Insurance Co*..... 324

8. SAME—LOAN—INDEBTEDNESS—RESERVE. In such a case, the rights being fixed as of the date of the death, there is no indebtedness due from the insured at the date of the lapse where there is a reserve to his credit sufficient to meet it. *Algoe v. Pacific Mutual Life Insurance Co.* 324

9. SAME—LIFE INSURANCE—FORFEITURE — EXTENSION — LOAN PROVISION. The insurance company does not have the right to forfeit extended insurance after the death of the insured, under a loan clause providing that, upon any default in premium or interest, the company may terminate the policy and obtain the amount due by deducting the same from the reserve and apply the overplus if any as a single premium of fully paid life insurance; as this was intended only as a means of foreclosing the lien by cancellation prior to a loss, and not as a forfeiture of a liability vested and accrued by the death of the insured. *Algoe v. Pacific Mutual Life Insurance Co.* 324

10. INSURANCE—ACTIONS ON POLICY — VENUE — STATUTES. An action upon a foreign fire insurance policy delivered in, and upon property within, W. county, must be brought in that county, under 3 Rem. & Bal. Code, § 6059-13½, providing that an insurance company may be sued upon an insurance policy in any county where the action arose, "by serving . . . upon the commissioner . . . if an alien or foreign company, or upon any duly licensed agent of the company residing in the county where the cause of action arose." *Davis-Kaser Co. v. Colonial Fire Underwriters Insurance Co*..... 383

INTEREST:

On making reassessment for improvement, see MUNICIPAL CORPORATIONS, 16, 17.

Of party in litigation, see PARTIES.

Levy of tax to meet interest on capitol building bonds, as creation of debt without submission of vote to people, see STATES.

Tender of interest on rescission of contract, see VENDOR AND PURCHASER, 2.

1. INTEREST—SUSPENSION—TENDER. Tender of the principal of a mortgage before suit, stops subsequent interest. *Easton v. Littooy* 648

INTERSTATE COMMERCE:

Persons engaged in, see COMMERCE.

INTERVENTION:

In actions in general, see PARTIES.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS — CIVIL LIABILITY— PLEADING — COMPLAINT. In a wife's action for damages through causing the intoxication of her husband, under Rem. & Bal. Code, § 6289, an allegation of resulting "abusive" conduct by the husband is sufficient to admit of proof of physical assaults, in the absence of a motion to make more definite and certain; or at least, if defective, was amendable to conform to the proof. *Nordlund v. Pearson*..... 358

2. SAME—PLEADING—ISSUES—EVIDENCE. In such an action, under a complaint seeking recovery for injuries which resulted in the impairment of health as well as loss of support, evidence of worry and mental distress is admissible. *Nordlund v. Pearson*..... 358

3. SAME — EVIDENCE — ADMISSIBILITY. In such an action, evidence that the plaintiff went out to work to support the family, including her husband and minor son, is admissible as tending to show the husband's failure to furnish her support, although it incidentally showed that she was also required to support her son and husband. *Nordlund v. Pearson*..... 358

4. INTOXICATING LIQUORS — CIVIL ACTIONS — EXCESSIVE DAMAGES. A verdict for $1,000 for damages to the person and means of support of a wife by causing the intoxication of her husband, under Rem. & Bal. Code, § 6289, held not excessive, considering the husband's earning power and the extent of the impairment of health and loss of support. *Nordlund v. Pearson*..... 358

IRRIGATION:

See WATERS AND WATER COURSES, 3-10.

ISSUES:

Identity of in actions, as affecting admission of evidence, see EVIDENCE, 9-11.

JEOPARDY:

Former jeopardy, see CRIMINAL LAW, 1.

JUDGES:

Conduct of, see CRIMINAL LAW, 2-4.
Comments on evidence, see TRIAL, 5.

JUDGMENT:

See GARNISHMENT.
Review, see APPEAL AND ERROR.
Decisions of courts in general, see COURTS.
In probate, conclusiveness as to fact and time of death of deceased, see EXECUTORS AND ADMINISTRATORS, 2-4.

JUDGMENT—CONTINUED.

On pleadings, see SPECIFIC PERFORMANCE.
Correction of excessive assessment, conclusiveness, see TAXATION, 3.
Directing judgment, see TRIAL, 3.

1. JUDGMENT—MODIFICATION—MATTERS NOT ADJUDICATED—EJECTMENT—APPEAL—DECISION—ISSUES—MATTERS. Where defendant had been using waters diverted across plaintiff's land under a prior right, and, a dispute having arisen as to the construction of a new ditch under an oral agreement to abandon or change the old one, plaintiff brought ejectment and succeeded to the extent that, on appeal, defendant was ordered ejected, unless he brought action within thirty days to condemn the new right of way across plaintiff's land, defendant is not entitled to a modification of the judgment allowing him to decline the condemnation, abandon the new right of way and return to the old ditch; since his rights, if any, in the old ditch, were not adjudicated in the action. *Engstrom v. Edendale Land Co.* 241

2. JUDGMENT—CONCLUSIVENESS—REASSESSMENTS—MUNICIPAL CORPORATIONS. In the absence of an adjudication of the actual amount of special benefits to specific property assessed, a prior judgment setting aside an assessment as having been in excess of the amount fixed by Rem. & Bal. Code, § 7705, limiting the original assessment by cities of the third class to an amount equal to the estimated cost of the work, is *res judicata* in proceedings to reassess of nothing save the invalidity of the first assessment roll. *Kuehl v. Edmonds* 195

3. JUDGMENT—CONCLUSIVENESS—ASSESSMENTS—MUNICIPAL CORPORATIONS—REASSESSMENTS—LIMIT—ENLARGED DISTRICT. A judgment upon appeal from a city council, reducing an assessment for a local improvement to fifty per cent of the assessed value of the property in the district, as limited by 3 Rem. & Bal. Code, § 7892-12, is not *res judicata* of the right to reassess the property in excess of the reduced amounts in proceedings therefor including the property, in an enlarged district, in which the unit for determining the fifty per cent limit is the entire enlarged assessment district, and not the particular lots or tracts composing the district; as the reassessment is an assessment *de novo* in all things; especially in view of 3 Rem. & Bal. Code, § 7892-14 expressly authorizing an enlarged district for a reassessment; and Id., § 7892-43, declaring that the reassessment may include property not in the original assessment district. *Eggerth v. Spokane* 221

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

On execution, see EXECUTION.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR, 1, 2.
Of courts, see COURTS.
Decedents' estates, see EXECUTORS AND ADMINISTRATORS, 1.
Knowledge of pendency of action as conferring jurisdiction, see PROCESS.

JURY:

Urging agreement of, see CRIMINAL LAW, 4.
Misconduct ground for new trial, see NEW TRIAL.
Reading documents to jury, see TRIAL, 2.
Instructions in civil actions, see TRIAL, 4, 5.

1. JURY—RIGHT TO JURY TRIAL—WAIVER. A demand for a jury trial was waived, where defendant subsequently advised the court that he was willing to proceed without a jury. *Alexander v. Mentzer* 552

JUSTIFICATION:

Of actionable words, see LIBEL AND SLANDER, 2.

KNOWLEDGE:

As ground of estoppel, see ESTOPPEL.
As affecting assumption of risks by servant, see MASTER AND SERVANT, 15.

LABOR LIENS:

See AGRICULTURE.

LACHES:

In rescission of contract of sale, see VENDOR AND PURCHASER, 4.

LANDLORD AND TENANT:

Right of administrator *de bonis non* to prosecute action, see EXECUTORS AND ADMINISTRATORS, 5.
Title to fixtures, see FIXTURES.

LANDS:

See PUBLIC LANDS.
Indian lands, see INDIANS.
Inclusion of excess agricultural lands within limits of town, see MUNICIPAL CORPORATIONS, 1.
Bonding state capitol lands for purpose of erecting buildings, see STATES,

LAPSE:

Of insurance policy, see INSURANCE, 6-9.

LARCENY:

Former jeopardy, see CRIMINAL LAW, 1.
Employer's indemnity insurance, see INSURANCE, 3.

LAST CLEAR CHANCE:

To avoid accident, see NEGLIGENCE, 4; RAILROADS, 5, 6.

LEVY:

Of tax to meet interest on capitol building bonds as creation of debt without submission to vote of people, see STATES.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—MATTERS PRIVILEGED—JUDICIAL PROCEEDINGS—EXCEEDING PRIVILEGE. Where a party on the witness stand stated of his opponent, "He is a thief; he stole two stands of bees of mine," the words were not privileged if the statement was voluntary and not in reply to any question, and was not relevant or pertinent to the subject of inquiry. *Viss v. Calligan*..... 673
2. LIBEL AND SLANDER—MATTERS PRIVILEGED—JUDICIAL PROCEEDINGS—QUESTION FOR JURY. Words uttered by defendant, after entry of judgment by a justice of the peace, demanding the arrest of plaintiff for theft, are privileged only if he sought the arrest in good faith and believed he was disclosing the facts for the purpose of advising the justice. *Viss v. Calligan*..... 673
3. SAME—ACTIONS—INSTRUCTIONS. In an action for slander, where there was no evidence that the defamatory words were repeated by the one in whose presence they were uttered, a requested instruction that plaintiff was not entitled to damages by reason of such hearer's repetition of the defamatory words was properly refused. *Viss v. Calligan*..... 673
4. LIBEL AND SLANDER — PLEADING AND PROOF — SPECIAL DAMAGES — WORDS ACTIONABLE PER SE. Words imputing a crime are actionable *per se*, and general damages for mental distress may be recovered, without alleging or proving special damages. *Viss v. Calligan*.. 673
5. SAME — DAMAGES — EXCESSIVE VERDICT. An award of $1,000 for general damages upon three causes of action for charging plaintiff on three separate occasions as being a thief is not so excessive as to indicate passion or prejudice on the part of the jury; as the admeasurement is not a matter of exact rule, and the award should not be disturbed, unless so large as to indicate passion or prejudice. *Viss v. Calligan*..... 673

LICENSEE:

Injury to licensee, see NEGLIGENCE, 3.
Use of water by, see WATERS AND WATER COURSES, 2.

LIENS:

Agricultural liens, see AGRICULTURE.
Loggers' liens, see LOGS AND LOGGING.
Right of mortgagee to subrogation on paying liens, see SUBROGATION.
For money paid on purchase price of land, see VENDOR AND PURCHASER, 14-16.

LIFE INSURANCE:

See INSURANCE, 1, 4-9.

LIMITATION:

On alienation of homestead, see INDIANS.

Conclusiveness of judgment as to limit of assessment of benefits for improvement, see JUDGMENT, 3.

On power of assessment, see MUNICIPAL CORPORATIONS, 14, 15.

LIMITATION OF ACTIONS:

1. LIMITATION OF ACTIONS—PERSONS BARRED—ADVERSE POSSESSION—QUIETING TITLE. The bar of the statute of limitations against an action to quiet title does not run against one in uninterrupted possession holding adversely under a claim of right. *Anderson v. Hall* 376

2. LIMITATION OF ACTIONS—IMPLIED LIABILITY ON WRITTEN CONTRACT. Semble, that an action by a vendee in an executory contract for land, for a rescission, and the recovery of purchase money paid and to have the amount declared a lien on the land, on account of the fraudulent representations of the vendors and breach of covenants, and their default and wrongful acts in preventing performance by putting it out of their power to convey, is an action upon an implied liability arising out of a written agreement, the limitation of which is six years. *Ihrke v. Continental Life Insurance & Investment Co.* 342

3. SAME—PLEADING—DEMURRER. A complaint must show on its face that the action is barred, to be subject to demurrer upon the ground that the action is not commenced within the time limited by law. *Ihrke v. Continental Life Insurance & Investment Co.* 342

4. LIMITATION OF ACTIONS—STOCK—UNPAID SUBSCRIPTIONS — CALL — DUE DATE. A cause of action upon an unpaid stock subscription of a solvent corporation, call for which was made payable at a future date, accrues and the statute of limitations commences to run from the date the call was due and payable, and not from the date of the call. *Handley Investment Co. v. Trenholme* 146

LOANS:

On insurance policy, see INSURANCE, 6-9.

LOCAL ACTIONS:

See VENUE.

LOCAL IMPROVEMENTS:

Title and subject of act relating to, see STATUTES, 3, 4.

LOGS AND LOGGING:

Right to condemn private way of necessity, see EMINENT DOMAIN, 4.

1. LOGS AND LOGGING—LABOR LIENS. Under Rem. & Bal. Code, § 1175, authorizing laborer's liens upon the whole or any part of manu-

LOGS AND LOGGING—CONTINUED.

factured lumber, a purchaser of lumber subject to lien is not entitled to a *pro tanto* reduction of the claims against his lumber from the fact that a considerable portion of the claims could have been satisfied out of other lumber disposed of in bankruptcy proceedings against the manufacturer. *Vaughan v. Fifer*..... 553

2. LOGS AND LOGGING—LABOR LIENS. The right to labor liens on manufactured lumber, under Rem. & Bal. Code, § 1163, would not be lost by reason of the fact that title had passed to a purchaser, where the lumber was still physically "at the mill," and further duties were to be performed by the manufacturer incident to its sale. *Vaughan v. Fifer* 553

3. LOGS AND LOGGING—LABOR LIENS—LUMBER "AT THE MILL." Lumber manufactured from saw logs was still "at the mill," within the terms of Rem. & Bal. Code, § 1163, entitling laborers thereon to liens, though piled on land close to the mill leased to the purchaser, where by the provisions of his contract, the sale was to be "f. o. b. the mill," evidenced by a bill of sale, the lumber was to be surfaced by the manufacturer and loaded by it in amounts as the purchaser might designate, and final payments to be made upon receipt of invoice and bills of lading issued therefor, none of which acts had taken place prior to the filing of liens. *Vaughan v. Fifer*..... 553

LUMBER:

Labor liens on lumber, see LOGS AND LOGGING.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 11-14, 17.

Dangerous machinery, see NEGLIGENCE, 3.

MALPRACTICE:

See PHYSICIANS AND SURGEONS, 1.

Liability of employer for on furnishing medical treatment to employee, see MASTER AND SERVANT, 10.

MANDAMUS:

1. MANDAMUS—WHEN LIES—TO COUNTY BOARDS—ISSUANCE OF WARRANTS. Mandamus lies to compel the issuance of county warrants against the county game fund in payment of the salary and expenditures of game wardens. *State ex rel. Beach v. Olsen*..... 56

MANDATARY:

Duty and liability to principal, see BAILMENT.

MARRIAGE:

Execution of deed in contemplation of marriage, see TRUSTS.

MASTER AND SERVANT:

Employers within industrial insurance act, see COMMERCE.
Industrial insurance act as violating due process clause of constitution, see CONSTITUTIONAL LAW.
Removal of corporate servants, see CORPORATIONS, 8.
Bond insuring fidelity of employees, construction, see INSURANCE, 3.
Liens for labor, see LOGS AND LOGGING.
Comparative negligence, see NEGLIGENCE, 7.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — CONSTRUCTION. The injury for which a workman is entitled to recover under the workmen's compensation act (3 Rem. & Bal. Code, § 6604-3), is one resulting from some fortuitous event, not necessarily accidental, which under 3 Id., § 6604-5, may have occurred away from the plant of the employer, if the workman were at the time in the course of his employment. *Stertz v. Industrial Insurance Commission* 588

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES AWAY FROM PLANT. Under the workmen's compensation act (3 Rem. & Bal. Code, § 6604-1 *et seq*), giving an employee or in case of death his dependents a right to compensation against the industrial insurance fund, if injured "upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer," an employee of a logging company killed by a shot from a third person, while in charge of the company's logging train, is entitled to compensation from such fund without the necessity of electing to sue the stranger or to take under the compensation statute. *Stertz v. Industrial Insurance Commission*..... 588

3. SAME. Under provisions of the workmen's compensation act excluding from compensation only wilfully incurred injuries, and those arising from diseases, and defining "injury" as used in the act as referring "only to an injury resulting from some fortuitous event," the right of compensation is not confined to injuries arising out of the employment nor to those of an accidental nature. *Stertz v. Industrial Insurance Commission*..... 588

4. SAME. The workmen's compensation act of this state (3 Rem. & Bal. Code, § 6604-1 *et seq*) is neither an employer's liability, nor an ordinary compensation act, but an industrial insurance statute, under which the remedy for rejected claims is against a fund in the hands of a state commission and not against the employer. *Stertz v. Industrial Insurance Commission*..... 588

5. SAME. The workmen's compensation act (3 Rem. & Bal. Code, § 6604-1 *et seq*) ends the jurisdiction of the court as to all phases of the master's liability to his servant for injuries resulting from fortuitous events, regardless of fault on the part of either, and remits the determination thereof to the industrial insurance commission. *Stertz v. Industrial Insurance Commission*..... 588

MASTER AND SERVANT—CONTINUED.

6. SAME—WORKMEN'S COMPENSATION ACT—CONSTRUCTION. The fact that the workmen's compensation act applies to "hazardous" and "extra hazardous" occupations does not restrict compensation merely to injuries arising out of the work, in the face of the express statutory provision including injuries from "fortuitous events" whether upon the premises or in the course of employment away from the plant. *Stertz v. Industrial Insurance Commission*..... 588

7. SAME. The employment of the word "accident" is a substitute for "fortuitous event" in the administrative details of the workmen's compensation act and cannot be construed as limiting the right of compensation to only accidental injuries when viewed in the light of the positive definitions of the statute. *Stertz v. Industrial Insurance Commission* 588

8. SAME. The provision of the workmen's compensation act requiring the employer to report all accidents and state whether they "arose out of or in the course of the injured person's employment," does not restrict compensation to accidental injuries, since such reports are not made a basis of compensation. *Stertz v. Industrial Insurance Commission* 588

9. SAME—WORKMEN'S COMPENSATION ACT — EXTRA HAZARDOUS EMPLOYMENTS. Employment as helper to the driver of an auto truck is not classed as extra hazardous by, and is not within, the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*; which act is therefore not a defense to an action by the servant against the master for personal injuries sustained in the course of his employment. *Collins v. Terminal Transfer Co*..... 463

10. SAME—INJURIES TO SERVANT—MEDICAL ATTENDANCE—LIABILITY FOR MALPRACTICE. Where an employer without profit to himself employed a physician to furnish medical attendance to the men, $1 per month being deducted from wages to pay hospital fees, he is liable for the malpractice of the physician only in case of failure to exercise reasonable care in the selection of a competent physician. *Engirbritson v. Tri-State Cedar Co*..... 279

11. MASTER AND SERVANT—INJURIES TO SERVANT — DEFECTIVE APPLIANCES. Where an auto truck was in a defective condition, requiring advancement of the spark in starting and rendering it dangerous to crank, the owner, charged with notice of the defect, is negligent and liable for injuries sustained in cranking by a driver's helper, who was ordered by the driver to take and operate the truck without giving him notice of the defect. *Collins v. Terminal Transfer Co.* 463

12. SAME—FACTORY ACT — GUARDING SAWS — EVIDENCE — INSPECTOR'S CERTIFICATE. The fact of a factory inspector's passing a mill having an open-backed edger without guard for the saws is only *prima facie*

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evidence that the saws were guarded where practicable in compliance with the factory act. *Lindblom v. Hazel Mill Co*..... 333

13. SAME—FACTORY ACT—GUARDING SAWS — FEASIBILITY — EVIDENCE. The fact that larger edgers were safely operated with a board at the back to guard the saws, and that a smaller edger was operated for some months while so guarded, is competent to show that it was feasible to use the guard on the smaller machine without added danger to others. *Lindblom v. Hazel Mill Co*..... 333

14. SAME—FELLOW SERVANTS—SUPERIORS—SEPARATE PARTS OF WORK. The driver of an auto truck and his helper are not fellow servants as to a trip which the driver had ordered the helper to take, when the helper was injured through a defect in the truck of which he was not notified by the driver. *Collins v. Terminal Transfer Co.* 463

15. MASTER AND SERVANT—INJURY TO SERVANT—METHODS OF WORK—ASSUMPTION OF RISK—OBVIOUS DANGERS. An experienced logger struck by the top of a dead tree that fell when hit by a rolling log, assumes the risk of the method of work adopted in falling a tree horizontally along a hillside and cutting it into logs in that position; since the dangers were as open and apparent to him as to the master. *Engirbritson v. Tri-State Cedar Co*..... 279

16. MASTER AND SERVANT — INJURIES TO SERVANT — ASSUMPTION OF RISKS—INCOMPETENT FELLOW SERVANTS—FRACTIOUS HORSE. One injured while working as a hay forker in stacking hay assumes the risk of the incompetence of a boy driving the horse on the hay fork and the fractious nature of the horse, where, after working one day, he complained about the boy then employed, resulting in the employment of the boy in question, who proved satisfactory to him, and he thereupon continued working with the boy and horse without complaint of either for a period of six days. *King v. Ramsey*..... 433

17. SAME—ASSUMPTION OF RISK—NOTICE OF DEFECT. A driver's helper does not assume the risk of a defect in an auto truck rendering it dangerous to crank, of which he had no notice, as the risk was not open and apparent. *Collins v. Terminal Transfer Co*..... 463

18. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS—QUESTION FOR JURY. It is a question for the jury to determine whether an inexperienced youth, working for one week as offbearer at an edger, was guilty of contributory negligence in stepping into the space between the edger and the rolls and placing his feet on the base of the edger frame to push a heavy cant, instead of adopting a safer method by taking advantage of the momentum before it had stopped, where he had received no instructions and testified that he had no knowledge of a safer way; and it is immaterial that he knew that unguarded saws were there where if his foot slipped they would probably injure him, since it was not

MASTER AND SERVANT—CONTINUED.

incumbent on him to keep them at all times in mind. *Lindblom v. Hazel Mill Co.* 333

19. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A driver's helper is not guilty of contributory negligence as a matter of law in attempting to start an auto truck, which stopped on a trip that he had been ordered to take, when he had no notice of a defect making it dangerous to crank it, and he had often seen the driver start it by cranking. *Collins v. Terminal Transfer Co.* 463

20. MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—RELATION—EVIDENCE. A motorcyclist whose negligence while practicing for a race caused injuries to the plaintiff is shown *prima facie* to be the servant of the defendant, where it appears that defendant owned the motorcycle and exercised control and supervision over it and the rider. *Maskell v. Alexander* 363

21. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. Whether a departure from his usual course, by the driver of an auto delivery truck, was within or without the course of his employment, so as to make his employer liable for his negligence, is a question for the jury, where, in making a night delivery out of the city, he was accompanied by a co-servant, as was frequently done without special directions, and on returning, he went out of his way a short distance to take him home; since the act bore such close relationship to his duties and the departure was not so marked that reasonable minds could not arrive at but one conclusion. *George v. Carstens Packing Co.* 637

22. MASTER AND SERVANT—INDEPENDENT CONTRACTORS — WATERS AND WATER COURSES—RIPARIAN RIGHTS. An upper proprietor operating a sawmill is not liable to a lower proprietor for damages through the operation of splash dams by an independent contractor delivering logs to the mill, on the theory of owing a nondelegable duty to protect the lower proprietors from improper use of the stream. *Cartier Van Dissel v. Holland-Horr Mill Co.* 239

MATURITY:

Of mortgage debt, see MORTGAGES, 1.

MEASURE OF DAMAGES:

See DAMAGES, 2-4.

For torts of mandatary, see BAILMENT.

For injury to ornamental trees, see TRESPASS, 2.

MEDICAL TREATMENT:

For injured servant, liability of master for malpractice, see MASTER AND SERVANT, 10.

MENTAL CAPACITY:

To make will, see WILLS, 3.

METHOD OF WORK:

Adoption of unsafe method by employee, see MASTER AND SERVANT, 15, 18.

MINES AND MINERALS:

Taxation of mines, see TAXATION, 2.

MINORS:

Contributory negligence of in riding bicycle in city street, see MUNICIPAL CORPORATIONS, 22, 23.

MISREPRESENTATION:

See FRAUD, 2; VENDOR AND PURCHASER, 1.
In procuring notes, see BILLS AND NOTES, 4.
On sale of stock, see CORPORATIONS, 1, 3-7.
Inducing trade of property, see EXCHANGE OF PROPERTY, 2-10.
By insured, see INSURANCE, 4, 5.

MITIGATION:

Of damages, see DAMAGES, 2.

MODIFICATION:

Of judgment, matters not adjudicated, see JUDGMENT, 1.

MONEY PAID:

Lien for money paid on purchase price of land, see VENDOR AND PURCHASER, 14-16.

MONEY RECEIVED:

Placing funds beyond reach of creditors, see FRAUD, 1.
Recovery of price paid for goods, see SALES, 2, 3.
Recovery of price paid for land, see VENDOR AND PURCHASER, 4-7, 14-16.

MORTGAGES:

Right to fixtures as between mortgagor and mortgagee, see FIXTURES, 4.
Separate property of married woman, see HUSBAND AND WIFE, 3.
Tender of principal before suit as affecting subsequent interest, see INTEREST.
Right of mortgagee to subrogation on payment of taxes and liens, see SUBROGATION.

1. MORTGAGES—FORECLOSURE—PREMATURE ACTION—MATURITY OF DEBT. An action to foreclose a mortgage will not be dismissed as prematurely brought, where the mortgagor had given notice to accelerate maturity, tendering unpaid matured interest and principal, and the contest waged was as to whether the debt was paid by the several tenders which had been declined owing to a *bona fide* dispute as to

MORTGAGES—CONTINUED.

the authority of agents to receive one of the payments. *Easton v. Littooy* 648

2. MORTGAGES — DISCHARGE — TENDER. Although a tender by the mortgagor will discharge the lien, a court of equity will not declare a forfeiture of the lien where refusal of the tender was not unreasonable on account of a *bona fide* controversy as to a payment made to an agent, and a discharge of the lien would work a discharge of the debt. *Easton v. Littooy*..... 648

3. MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—TENDER OF DEBT. Attorney's fees cannot be allowed on the foreclosure of a mortgage where the suit was the result of the mortgagee's mistake in refusing a tender. *Easton v. Littooy*..... 648

MOTORCYCLES:

Negligence in operation of on race track, see NEGLIGENCE, 1, 2.

MUNICIPAL CORPORATIONS:

Degree of care imposed on contractor in using explosive in street work, see EXPLOSIVES.

Conclusiveness of judgment as to assessment of benefits for improvement, see JUDGMENT, 2, 3.

Statutes relating to local improvements, see STATUTES, 1, 3-5.

Street railroads, see STREET RAILROADS.

Water supply, see WATERS AND WATER COURSES, 1.

1. MUNICIPAL CORPORATIONS—INCORPORATION—VALIDITY—EXCESS AGRICULTURAL LANDS. The inclusion of excess agricultural lands within the limits of a town does not necessarily render the entire incorporation proceedings void, although the lands might not be affected by the incorporation. *State ex rel. Cummings v. Blackwell*..... 81

2. MUNICIPAL CORPORATIONS—OFFICERS — SALARY — QUALIFICATION — BOND—APPROVAL. Failure of the council to approve the bond of one appointed and acting as town marshal does not prevent his becoming an officer *de jure* and entitled to the salary, no other person being appointed or serving during the term; especially since Rem. & Bal. Code, § 7722, merely requires the marshal to execute a bond to the town before entering upon his duties and not that bond shall be approved by the council before entering upon his duties; the bond having been delivered to the clerk and never rejected. *Bartholomew v. Springdale* 408

3. MUNICIPAL CORPORATIONS — CONTRACT FOR PUBLIC IMPROVEMENT — CONSTRUCTION. Under a contract for public work for a city, wherein the contractor agreed "to pay the wages of all persons and for assistance of every kind upon or about said work, and for all materials purchased therefor," and authorized the city to withhold payments until such wages, assistance and materials were fully paid

MUNICIPAL CORPORATIONS—CONTINUED.

for, the city was not warranted in withholding money for the purpose of paying claims for meats and groceries supplied a subcontractor, such articles not falling within the terms "assistance of every kind employed," nor of "materials," the latter term applying only to materials entering into the structure. *Mitchell v. Berlin-McNitt Co.* 582

4. SAME. The rule rendering a public contractor liable on his bond for the price of all goods necessary to the performance of his contract does not apply when the action is not upon the bond but is one involving the construction of the contract between the city and the contractor. *Mitchell v. Berlin-McNitt Co*..... 582

5. MUNICIPAL CORPORATIONS—CONTRACT FOR PUBLIC WORK—ESTOPPEL OF CONTRACTOR. The fact that a public contractor had assured firms supplying provisions to a subcontractor that he had made arrangements to accept orders drawn on him by the subcontractor, to be turned over to a third party for payment, would not estop the contractor from claiming a particular fund retained by the city for the purpose of meeting such claims, where he accepted such orders and there was no misrepresentation or breach of promise on the part of the contractor, but the fund in the hands of the third party had been dissipated by payment to preferred creditors instead of by application *pro rata* to all the creditors. *Mitchell v. Berlin-McNitt Co.* 582

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — POWER OF COURT TO FIX BOUNDARIES. The superior court has no power, under the statute authorizing eminent domain proceedings by cities, to direct the exact limits of territory that should be included in any assessment district, that being a legislative power delegated to the eminent domain commissioners. *Seattle v. Puget Sound Traction, Light & Power Co*..... 567

7. MUNICIPAL CORPORATIONS—ASSESSMENT OF BENEFITS — ARBITRARY ASSESSMENT. The action of the eminent domain commissioners in assessing the total cost for the appropriation of land for street purposes against the remainder of the tract through which the street was opened was arbitrary, where the object was to extend an existing street in a settled district through the tract, so as to connect with a paved boulevard which was of some special benefit to the property owners of the district whose street was thus extended. *Seattle v. Puget Sound Traction, Light & Power Co*..... 567

8. MUNICIPAL CORPORATIONS — EMINENT DOMAIN — APPEAL — RECORD. The superior court having entire jurisdiction of eminent domain proceedings until final judgment, the record on appeal from a judgment therein properly includes proceedings before one of the judges of the court who, subsequent to the judgment, had been disqualified for prejudice and a second trial held before another judge of the same court. *Seattle v. Puget Sound Traction, Light & Power Co*..... 567

MUNICIPAL CORPORATIONS—CONTINUED.

9. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS —SUBSEQUENT STATUTES. As the legislature may authorize a reassessment even where the work was ordered done without any initial jurisdiction or power in the city, a reassessment may be made under an act passed subsequent to the making of the improvement and the original assessment roll. *Nichols v. Spokane*..... 235

10. SAME—REASSESSMENT — APPORTIONMENT — STATUTES. A reassessment being a proceeding *de novo* in which the council may enlarge the district, a reassessment upon an enlarged district need not be made in accordance with the five-zone system, as required of original assessments by 3 Rem. & Bal. Code, § 7892-13; there being no such statutory requirement for reassessments. *Nichols v. Spokane* 235

11. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS —PROCEDURE—STATUTES. A reassessment under 3 Rem. & Bal. Code, § 7892-43 is an independent proceeding which may be made without reference to Id., §§ 7892-13 and 7892-14, relating to the initiation of the improvement, which have no application to reassessments, this being the necessary implication from Id., § 7892-44 specifying in what particulars the law governing original assessments shall apply to reassessments. *Eggerth v. Spokane*..... 221

12. SAME—REASSESSMENTS—VALIDITY. Any reassessment based on notice and a hearing is valid where in its aggregate it does not exceed the actual cost of the improvement and interest, less any sum paid under a former assessment, and it is equitably distributed upon all property specially benefited by the improvement in proportion to such benefits. *Eggerth v. Spokane*..... 221

13. SAME — REASSESSMENTS — REBATES — NONOBJECTING OWNERS — WAIVER OF RIGHTS. In making a reassessment, upon reducing the amounts charged against objecting owners, no levy can be made for the purpose of rebating to nonobjecting owners whose original assessments were left unchanged; since by not objecting they confessed the original assessments, and there is no authority for such rebates. *Eggerth v. Spokane*..... 221

14. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS— LIMITATIONS—ESTIMATES — REASSESSMENTS — STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 7705, limiting the power of assessment of a city of the third class under the old law to an amount equal to the estimated cost, does not limit the power of such city to levy a supplemental or reassessment for the full cost of the work, under the subsequent act of 1911, 3 Rem. & Bal. Code, §§ 7892-42 and 7892-43, which reenacted and carried forward the act of 1893 (2 Rem. & Bal. Code, §§ 7893, 7894, 7895, and 7899), authorizing a reassessment based upon the "actual cost of the improvement at the time of its completion," where the first assessment had failed in whole or in

MUNICIPAL CORPORATIONS—CONTINUED.

part for any reason, including any "omission, failure or neglect . . . to comply with provisions of the charter or laws . . . as to . . . estimate . . ." etc. (overruling on rehearing, Id., 85 Wash 307). *Kuehl v. Edmonds*..... 195

15. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS—LIMITATIONS. An attempt to reassess under a prior law the full cost of an improvement, abortive by reason of an insufficient estimate, does not exhaust the power to reassess to pay the actual cost. *Kuehl v. Edmonds*..... 195

16. SAME—PUBLIC IMPROVEMENTS—REASSESSMENTS — INTEREST. Upon making a reassessment to cover costs that could not be legally included in the original assessment, it is proper to include interest on warrants issued for the improvement, from the date of their issuance to the date when the first assessment for that amount began to bear interest. *Kuehl v. Edmonds*..... 196

17. MUNICIPAL CORPORATIONS—REASSESSMENTS — INTEREST AND COSTS—REAPPORTIONMENT. Upon levying a reassessment to make up a reduction in the original assessment allowed to objecting owners, those who paid up their original assessments in full cannot be assessed to make up accumulated interest and the cost of the reassessment necessitated by the nonpayment of the objecting owners. *Collins v. Ellensburg*..... 232

18. SAME—REASSESSMENT—REVIEW—DECISION. The inclusion of an unlawful rebate in a reassessment does not necessitate a new assessment, as a horizontal reduction is a mere matter of calculation. *Eggerth v. Spokane*..... 221

19. MUNICIPAL CORPORATIONS—STREETS—EXTENSION OVER TIDE LANDS. A city abandons and loses its right to extend a street over tide lands to the harbor lines, as authorized by Const., art. 15, § 3, where it acquiesced in a state lease to, and occupancy by, one maintaining a public dock and wharf for nearly twenty years, and for ten years after passing ordinances extending its streets, did not attempt to physically occupy or improve the portion of the street leased by the state, or take any steps to call the state's attention to its claim to the street; in view of §§ 1 and 2 of the same article, authorizing the state to make a lease of such lands. *In re Percival Application No. 92, To Lease Harbor Area, Olympia*..... 470

20. MUNICIPAL CORPORATIONS—USE OF STREETS—OBSTRUCTIONS—ORDINANCES—CONSTRUCTION—VIOLATION—NEGLIGENCE PER SE. A city ordinance prohibiting the maintenance of guy wires at less than a certain height above the "authorized grade of any street," under penalty of a fine, being penal and subject to strict construction, can have no application to streets for which no grade had been authorized by ordinance or some equally formal act evidenced by writing or actual

MUNICIPAL CORPORATIONS—CONTINUED.

improvement; hence the maintenance of such a wire in a street the grade of which was established only by user, is not a violation of the ordinance, and would not be negligence *per se*. *Clark v. Pacific Power & Light Co*..... 130

21. MUNICIPAL CORPORATIONS—STREETS—ACCIDENTS AT CROSSINGS—ORDINANCES—RIGHT OF WAY. A pedestrian waiting to board a street car stopping at a street intersection, need not be exactly upon the crossing to be within the rule of an ordinance giving pedestrians the right of way at street crossings; and is shown to be approximately on the crossing where it appears that he was from eight to thirty feet east of the northeast curb of a street corner. *Yanase v. Seattle Taxicab & Transfer Co*..... 415

22. MUNICIPAL CORPORATIONS — ACCIDENT IN STREET — CONTRIBUTORY NEGLIGENCE—DEGREE OF CARE—CHILDREN. In an action for personal injuries sustained by a boy riding a bicycle and colliding with an automobile, an instruction as to the degree of care required by a child is sufficient where it is based upon the conduct of a reasonably prudent person of his age and capacity, using his faculties and powers of observation, having in consideration his age and experience; hence refusal of other instructions thereon is not error. *Barton v. Van Gesen*..... 94

23. SAME — AUTOMOBILE ACCIDENT — CONTRIBUTORY NEGLIGENCE — EVIDENCE—SUFFICIENCY. A boy riding a bicycle into the rear wheel of an automobile is guilty of contributory negligence which is the proximate cause of his injuries, where he was exceeding the speed limit and looking back, and could have avoided the accident if he had been looking in the direction he was going. *Barton v. Van Gesen*..... 94

24. SAME—AUTOMOBILE ACCIDENT—WARNING. The driver of an automobile, turning slowly at a street intersection, is under no duty to sound a warning, where there was nothing upon the street, except boys approaching about a block away, and a warning would have been of no benefit to any person. *Barton v. Van Gesen*..... 94

25. SAME—AUTOMOBILES—ORDINANCE — TURNING TO LEFT. Under an ordinance making it unlawful for any person while driving an automobile to occupy other than the right side of any street, except within the block at the point of destination, a person is within his rights, in turning at the center of the intersection of streets, to turn to his left to the place of destination. *Barton v. Van Gesen* 94

26. MUNICIPAL CORPORATIONS—USE OF STREETS—INJURY TO PEDESTRIANS —ICE WAGON—NEGLIGENCE—QUESTION FOR JURY. It is for the jury to determine whether an ice deliverer was guilty of negligence in placing a two hundred pound piece of ice in the delivery wagon in such a position that, after delivery of pieces holding it in place, it

MUNICIPAL CORPORATIONS—CONTINUED.

was liable to shake loose in driving over rough ground, and did so, striking a child in the street. *Bowers v. Standard Fuel & Ice Co.* 400

27. SAME—PEDESTRIAN OR TRESPASSER—QUESTION FOR JURY. The fact that a child had been a trespasser on the step of an ice wagon does not prevent recovery for injuries received after she had left the wagon and her status as a traveler had been resumed, and such fact is a question for the jury, where the evidence was conflicting. *Bowers v. Standard Fuel & Ice Co.* 400

28. MUNICIPAL CORPORATIONS—CLAIMS FOR DAMAGES—TIME FOR FILING. A claim for damages against the city alleging injuries on Dec. 14, 1913, received by reason of typhoid germs in the city water, which injuries "are still accruing and have been continuously accruing since the date aforesaid," filed on April 4th following, is too late, not having been filed within thirty days after the time when the claim accrued, as required by Rem. & Bal. Code, § 7998; filing within the thirty days not being excused by the allegations of continuously receiving additional injuries. *Dickie v. Centralia* 467

29. SAME—CLAIMS FOR DAMAGES—NATURE OF CLAIMS. Although the city's negligence occurred in business rather than in a governmental function, a claim for damages through typhoid germs in the city water must be filed within thirty days, under Rem. & Bal. Code, § 7998, requiring all claims for damages to be so filed. *Dickie v. Centralia* 467

30. MUNICIPAL CORPORATIONS—CLAIMS—TIME FOR PRESENTATION — DEFECTS IN STREETS—"EXISTENCE" OF SNOW AND ICE. The Spokane city charter, art. 12, § 115, providing a ten-day limitation for filing notice of claims for personal injuries caused by the "existence of snow or ice" upon a sidewalk has no application to injuries sustained through the active negligence of the city in accumulating ice and large obstructing cinders on the sidewalk in washing its fire wagon. *Taylor v. Spokane* 629

31. SAME—DEFECTS IN STREETS—GOVERNMENTAL AGENCY—NOTICE. A city's exemption from liability for the negligence of its fire department as one of its governmental agents does not extend to injuries sustained through the negligent condition of a sidewalk, of which the city had constructive notice; since the negligence of the governmental agent then becomes the negligence of the city. *Taylor v. Spokane* 629

MUTUALITY:

Of covenants in contract for land, see VENDOR AND PURCHASER, 7.

NAMES:

Irrigation districts, see WATERS AND WATER COURSES, 8.

NECESSITY:

Of objections or exceptions for purpose of review, see APPEAL AND ERROR, 4-6.
For accounting, see PARTNERSHIP.
For service of process, see PROCESS.
For findings in equity case, see TRIAL, 6.

NEGLIGENCE:

See EXPLOSIVES; PHYSICIANS AND SURGEONS.
Of carrier, see CARRIERS.
Measure of damages, see DAMAGES, 2-4.
Admissibility of evidence as *res gestate*, see EVIDENCE, 2.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 18, 19.
Cause of personal injuries in city street, see MUNICIPAL CORPORATIONS, 20-31.
Of person injured on street, see MUNICIPAL CORPORATIONS, 22, 23.
In loading ice wagon, see MUNICIPAL CORPORATIONS, 26.
In operation of train, see RAILROADS, 1-6.
Of person injured by operation of railroad, see RAILROADS, 4.
In setting fire to timber, see RAILROADS, 7, 8.
Irrigation company, see WATERS AND WATER COURSES, 3.

1. NEGLIGENCE—DUTY—MOTORCYCLISTS—WANTON OR RECKLESS ACTS. Motorcycle racers practicing on a race track owe a duty to a watchman stationed on the track to exercise reasonable care and prudence for his safety, and not to wantonly or recklessly injure him. *Maskell v. Alexander* 363

2. NEGLIGENCE—PROXIMATE CAUSE—ACTIONS—EVIDENCE—SUFFICIENCY. A motorcycle racer, practicing on a race track, is guilty of gross negligence, where it appears that he came up behind another rider and crossed in front of him, crowding him off the beaten path although there was ample room to pass without doing so; and such negligence was the proximate cause of an injury to a watchman standing near who was run into by the rider who was interfered with. *Maskell v. Alexander* 363

3. NEGLIGENCE — DANGEROUS OPERATIONS — DUTY TO VOLUNTEER—ASSUMPTION OF RISKS. One who was attracted to the scene of the lifting of a derailed engine, by reason of the element of danger, which he fully appreciated, is a mere licensee or volunteer to whom no duty was owed except not to wilfully and wantonly injure him, although when warned away he took up a place on property adjoining the right of way which he deemed safe; since he assumed the risk of apparent danger and cannot complain of want of care or unskillfulness whereby he was injured. *Shafer v. Tacoma Eastern R. Co.* 164

NEGLIGENCE—CONTINUED.

4. SAME—"LAST CLEAR CHANCE"—PRESUMPTIONS. In such case the doctrines of "last clear chance" and *"res ipsa loquitur"* have no application. *Shafer v. Tacoma Eastern R. Co*..... 164

5. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A policeman employed to watch a gate at a race track during motorcycle practice is not guilty of contributory negligence in taking up his place on the track near the gate where it was necessary for him to be in order to enforce his authority and keep children off the track. *Maskell v. Alexander*..... 363

6. NEGLIGENCE—COMPARATIVE NEGLIGENCE. On conflicting evidence, both the fact and the degree of comparative negligence, where the doctrine obtains, are questions for the jury. *Lindblom v. Hazel Mill Co*..... 334

7. NEGLIGENCE—COMPARATIVE NEGLIGENCE — INJURIES TO SERVANTS — INSTRUCTIONS. Under the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-8, adopting the doctrine of comparative negligence in certain cases, an instruction is as favorable to defendant as the law warrants, where the jury were told that there may be a recovery notwithstanding the negligence of the plaintiff, if he was exercising ordinary care, and his negligence was slight in comparison with defendant's negligence, and if so, and the defendant's negligence was gross in comparison, and the plaintiff, although not exercising extraordinary care, was in the exercise of ordinary care, he would be entitled to recovery. *Lindblom v. Hazel Mill Co*..... 333

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEW TRIAL:

1. NEW TRIAL—GROUNDS—MISCONDUCT OF JUROR. The denial of a new trial for misconduct of a juror is a proper exercise of the discretion of the trial court, where upon disputed facts, the evidence preponderates in favor of the ruling. *Brown v. Walla Walla*... 116

NOMINAL DAMAGES:

See DAMAGES, 1.

NONSUIT:

See DISMISSAL AND NONSUIT.
On trial, see TRIAL, 7.

NOTARIES:

Voluntary false affidavit sworn to before notary, see PERJURY.

NOTES:

Promissory notes, see BILLS AND NOTES, 4.

NOTICE:

Of appeal, see APPEAL AND ERROR, 8, 9.
To corporation of fraud in sale of stock, see CORPORATIONS, 7.
As affecting assumption of risk by servant, see MASTER AND SERVANT, 17.
Claim for damages, see MUNICIPAL CORPORATIONS, 28-30.
To city of dangerous condition of sidewalk, see MUNICIPAL CORPORATIONS, 31.
Organization of irrigation district, see WATERS AND WATER COURSES, 5, 6.

NUNCUPATIVE WILLS:

See WILLS, 2.

OATH:

See PERJURY.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 4, 5.
To evidence, see TRIAL, 1.

OBSTRUCTIONS:

In city street, see MUNICIPAL CORPORATIONS, 20, 30, 31.
On right of way at crossing, see RAILROADS, 3.

OCCUPATION:

Of vacant lands, see ADVERSE POSSESSION, 1.

OFFICERS:

Corporate officers, see CORPORATIONS, 4-8.
County officers, see COUNTIES, 1
County or state, see GAME.
Mandamus affecting, see MANDAMUS.
Municipal officers, see MUNICIPAL CORPORATIONS, 2.
Wrongful levy by sheriff, see SHERIFFS AND CONSTABLES.

1. OFFICERS—SALARY—DE JURE OFFICER—QUANTITY OF SERVICES. The right of a *de jure* officer to his salary is not affected by the quantity of the services rendered, in the absence of an abandonment of the office. *Bartholomew v. Springdale* 408

ORDERS:

Review of, see APPEAL AND ERROR, 2; CERTIORARI.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 20, 21, 25.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 4-8.

PARTIES:

In action to enforce farm laborer's lien, see AGRICULTURE.
On appeal, see APPEAL AND ERROR, 7-9.
Entitled to allege error, see APPEAL AND ERROR, 12-14.
Rights and liabilities as to costs, see COSTS.
Condemnation proceedings, see EMINENT DOMAIN, 3.
Entitled to condemn lands, see EMINENT DOMAIN, 4.
Identity of at former trial, see EVIDENCE, 9, 10.
Bound by decree in probate, see EXECUTORS AND ADMINISTRATORS, 4.
Barred by statute, see LIMITATION OF ACTIONS, 1.
Admissions in answer as to plaintiff's capacity to sue, see PLEADING, 1.
Right to subrogation, see SUBROGATION.

1. PARTIES—INTERVENTION—COMMON LAW. There being no right of intervention at common law, its existence in an action at law depends upon statute. *State ex rel. Williams v. Superior Court*... 40

2. PARTIES—INTERVENTION—RIGHT TO INTERVENE—"INTEREST IN LITIGATION"—STATUTES. In an action at law for a balance due on railroad construction work, brought by an assignee of the contract against the principal contractor and the railroad company, the plaintiff's subcontractor for part of the work under a different contract with plaintiff, to which the defendants were not parties, is not entitled to intervene, under Rem. & Bal. Code, § 202, authorizing intervention by any person who has an interest in the matter in litigation, in the success of either party, or an interest against both, and providing that an intervention takes place when a third person is permitted to become a party by joining in the claims of either party or demanding anything adversely to both: since the interest must be such that the intervener will either gain or lose by the direct legal operation of the judgment, and not merely that of a contract creditor of the plaintiff without privity with defendants, whose only interest is in the creation of a greater fund from which to realize upon his claims against the plaintiff. *State ex rel. Williams v. Superior Court* 40

PARTNERSHIP:

1. PARTNERSHIP—SETTLEMENT—ACCOUNTING—NECESSITY. Where one of two concerns that had been doing business as partners ceased to do business and gave a demand note for the amount of a balance struck, assigning all accounts as collateral security, the other partner may sue on the note as upon a settlement without the necessity of an accounting. *Kilbourne v. Rathbun*..... 121

PASSENGERS:

Carriage of, see CARRIERS.

PATENTS:

For public lands, see PUBLIC LANDS, 2.

PAVEMENT:

See STREET RAILROADS.

PAYMENT:

Presentment of check for, see BILLS AND NOTES, 3.
For stock, see CORPORATIONS, 2.
In fraud of creditors, see FRAUD, 1.
Receipt of by agent, see PRINCIPAL AND AGENT, 2, 3.
Subrogation on payment, see SUBROGATION.

1. PAYMENT—EVIDENCE—NOTE IN LIEU OF CASH. Upon the sale of a combined harvester and the execution of a chattel mortgage to secure notes for the price, it is consistent to accept a note "in lieu" of cash for the first installment which was to be paid by delivery of the note, and to describe it in, and secure it by, the mortgage; since taking the note in lieu of cash does not extinguish the debt. *Holt Mfg. Co. v. Brotherton*..... 354

2. PAYMENT—PLEADING—BURDEN OF PROOF. Payment must be pleaded in an affirmative defense, and the burden of proving it and its specific application is upon the party pleading it. *Palmer v. Parker*..... 683

PENDENCY OF ACTION:

Knowledge of as conferring jurisdiction, see PROCESS.

PERFORMANCE:

Of contract to convey land, see VENDOR AND PURCHASER, 10.

PERJURY:

Arrest of witness at trial for, see CRIMINAL LAW, 3.

1. PERJURY—FALSE SWEARING—STATUTES. A prosecution for perjury in the second degree may be predicated upon an affidavit as to the financial condition of a bank voluntarily made by one of its officers and not required by law; under Rem. & Bal. Code, § 2353, defining perjury in the second degree as false swearing concerning any matter whatsoever by any person "whether as a volunteer or in a proceeding or investigation authorized by law"; the use of the disjunctive plainly manifesting the intent to treat voluntary false swearing the same as false swearing in a proceeding or investigation. *State v. Howard*..... 481

2. SAME—"OATH"—STATUTES. An "oath" as a basis of a prosecution for false swearing or perjury in the second degree does not imply a form of inquiry required by law; especially in view of Rem. & Bal. Code, § 2354, defining an oath as "an affirmation and every other mode authorized by law of attesting the truth of that which is stated," and declaring that any person who shall state any matter under oath shall be deemed to swear thereto. *State v. Howard*. 481

PERJURY—CONTINUED.

3. SAME—SWORN STATEMENTS—AFFIDAVITS BEFORE NOTARY. Under Rem. & Bal. Code, § 8298, authorizing a notary public to take affidavits and administer all oaths required by law to be administered, false swearing or perjury in the second degree may be predicated upon a false affidavit sworn to before a notary public, although the affidavit was not required by law; an affidavit being not only a written oath but a statement of things sworn to. *State v. Howard* 481

PERMISSIVE USE:

Of railroad right of way, see ADVERSE POSSESSION, 2.
Of private way by public, see HIGHWAYS.

PERSONAL INJURIES:

See NEGLIGENCE.
To passengers, see CARRIERS.
Damages for, see DAMAGES, 3, 4.
Caused by explosives, see EXPLOSIVES.
To employee, see MASTER AND SERVANT.
To person on city street, see MUNICIPAL CORPORATIONS, 20-27, 30, 31.
To person on or near railroad tracks, see RAILROADS, 1-6.

PHYSICIANS AND SURGEONS:

Liability of employer for malpractice on furnishing medical treatment to employee, see MASTER AND SERVANT, 10.
Privileged communications, see WITNESSES, 1.

1. PHYSICIANS AND SURGEONS — ACTION FOR SERVICES — NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a patient died after an extrahazardous operation and the physician sued to recover for his services, the defense of negligence is not made out merely by showing that no blood test was made before the operation to determine the oxygen carrying power of the blood, there being no attempt to show that the failure to take the blood test contributed to the death, or that such test had ever been made in operations of that character in that vicinity. *Harvey v. Richardson* 245

2. SAME—DEFENSES—CONTRACT. In an action by a physician for services in performing an operation, evidence of a remark by plaintiff, after the patient had refused to go to specialists recommended, that if she was willing to take a chance with him, he was willing to take a chance with her, does not raise the inference that plaintiff took the chance of losing the value of his services if the operation was not successful. *Harvey v. Richardson* 245

3. SAME. Where a physician, operating for goiter, did not contract to remove it, his right to recover for his services is not defeated by the fact that the operation was not successful. *Harvey v. Richardson* 245

PLEADING:

Amendment on appeal, see APPEAL AND ERROR, 15, 16.
Review of rulings on, see APPEAL AND ERROR, 17.
In civil action for damages through sale of liquor, see INTOXICATING LIQUORS, 1, 2.
Damages in action for slander, see LIBEL AND SLANDER, 4.
Statute of limitations, see LIMITATION OF ACTIONS, 3.
Payment, see PAYMENT, 2.
Judgment on in action to enforce contract for exchange of property, see SPECIFIC PERFORMANCE.

1. PLEADING—ANSWER—ADMISSIONS — PARTIES — CAPACITY TO SUE — HUSBAND AND WIFE—COMMUNITY PROPERTY. In an action for damages for failure to supply the water for irrigation of lands alleged to be owned by the plaintiff, defendant's answer admitting plaintiff's ownership admits the right and capacity of the plaintiff to sue for the damages without joining his wife as a party plaintiff, although the lands may be community property. *Chute v. Attalia Land Co*..... 4

2. PLEADING—AMENDMENTS—AT TRIAL. Under Rem. & Bal. Code, § 303, allowing amendments of any pleadings in furtherance of justice, the discretion of the trial court in allowing amendments will not be disturbed on appeal except for abuse; and it is not an abuse of discretion to allow a trial amendment to an answer without terms, where the plaintiffs objected to a continuance that had been granted on terms to enable them to reply to the amendment. *Stoner v. Fryett* 89

3. PLEADING — AMENDMENT — AT TRIAL. Trial amendments being within the discretion of the court, under Rem. & Bal. Code, § 303, allowing amendments in furtherance of justice, it is not error, in an action for personal injuries, to allow an answer alleging contributory negligence by a boy on a bicycle to be amended by pleading an ordinance and alleging that the boy was exceeding the speed limit. *Barton v. Van Gesen*..... 94

4. PLEADING—AMENDMENT—DEMURRER — DISCRETION. After overruling a general demurrer to the complaint and the filing of an answer, it is discretionary for the trial court to deny leave to file an amended answer in the nature of a second demurrer alleging that the action had not been commenced within the time limited by law and that the facts in the complaint did not state a cause of action. *Anderson v. Hall*..... 376

5. PLEADING—AMENDMENT — CONDITION OF CAUSE. The denial of a request to amend a pleading was not error, where it was not presented until after the cause had been tried and the court had announced its ruling. *Post v. Tamm*..... 504

6. PLEADING — VARIANCE — NONSUIT — AMENDMENT TO CONFORM TO PROOF. In an action tried to the court without a jury, it is not error

PLEADING—CONTINUED.

to refuse to grant a nonsuit on the ground of variance, where the evidence was admitted without objection, as the complaint will be deemed amended to conform to the proof. *Cremidas v. Dallas*.. 441

POLICE POWER:

To require railway company to pave tracks, see STREET RAILROADS, 5.

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.

POWERS:

Of broker, see BROKERS, 1.
Of corporation, see CORPORATIONS, 12, 14, 15.
Of county commissioners, see COUNTIES, 3.
Of executors, see EXECUTORS AND ADMINISTRATORS, 5, 6.
Of Congress to extend period of limitation on alienation of lands by Indians, see INDIANS, 2.
Of court to fix limit of assessment district, see MUNICIPAL CORPORATIONS, 6.
Of city to require pavement of street, see STREET RAILROADS.
Of irrigation district, see WATERS AND WATER COURSES, 7.

PRACTICE:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; DAMAGES; EVIDENCE; EXECUTION; NEW TRIAL; PLEADING; TRIAL; TROVER AND CONVERSION.

PREFERENCES:

By creditors of insolvent corporation, see CORPORATIONS, 13.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 19-25.

PRESCRIPTION:

Acquisition of rights, see ADVERSE POSSESSION.
Establishment of highways, see HIGHWAYS.
Right to easement in ditch, see WATERS AND WATER COURSES, 2.

PRESENTMENT:

Of check, see BILLS AND NOTES, 3.
Of claims for salary of game wardens, see COUNTIES, 2.
Of claim against city for damages, see MUNICIPAL CORPORATIONS, 28-30.

PRESUMPTIONS:

See NEGLIGENCE, 4.
On appeal, see APPEAL AND ERROR, 19, 26.
From decree in probate, see EXECUTORS AND ADMINISTRATORS, 2, 3.
As to value of property converted, see TROVER AND CONVERSION, 2.

PRICE:

Action for price of corporate stock, see CORPORATIONS, 6, 7.
Tender in action to recover purchase price, see TENDER.

PRINCIPAL AND AGENT:

See BAILMENT; BROKERS.
Corporate officers and agents, see CORPORATIONS, 5-11.
Knowledge of agent as to condition of applicant's health as estopping company from questioning validity of policy, see INSURANCE, 5.

1. PRINCIPAL AND AGENT — RELATION — WRONGFUL ACTS OF AGENT — LIABILITY OF PRINCIPAL. A creditor, secured by note and mortgage, who, by power of attorney, appointed an agent to collect payments and execute *pro rata* releases upon the sale of the mortgaged lots, cannot recover from the mortgagor for misappropriations by the agent in failing to apply payments on the mortgage; since he was his agent, and not the agent of the debtor or mortgagor. *Olson v. Schulz* 475

2. PRINCIPAL AND AGENT — APPARENT AUTHORITY — COLLECTION OF NOTES—PLACE OF PAYMENT—POSSESSION. Where mortgage coupon interest notes were made payable at the office of agents, it was the duty of the mortgagee to have the coupons there when due, and the mortgagor may assume that the agents are authorized to receive payment, although the coupons were not surrendered at the time of payment, where the agents had been in the habit of demanding and receiving such payments without having possession of the coupons. *Easton v. Littooy* 648

3. SAME—AUTHORITY OF AGENT—RATIFICATION—ESTOPPEL. A mortgagee who failed to immediately repudiate the authority of agents who had been in the habit of receiving payment of interest coupons without possession of the coupons, upon notice that they had demanded and received a payment, but waited some time for remittance from them until they became bankrupt, is estopped to dispute the agency. *Easton v. Littooy* 648

PRINCIPAL AND SURETY:

Notice of appeal to surety on cost bond, see APPEAL AND ERROR, 8.

1. PRINCIPAL AND SURETY—BOND OF CONTRACTOR—PUBLIC WORK—FILING CLAIMS—WAIVER. Where the state and a contractor on public work agreed to arbitrate disputes as to the classification of the work

PRINCIPAL AND SURETY—CONTINUED.

and to disburse the amounts found due by payment 1st, of all unpaid labor claims, 2d, claims of materialmen, and 3d, the balance to the contractor, the agreement for arbitration waived the provisions of the statute requiring the filing of claims against the contractor's bond, given to secure lien of labor and materials furnished under the contract. *Fidelity & Deposit Co. v. Spokane Merchants' Association* 170

PRIORITIES:

Of claims against insolvent corporations, see CORPORATIONS, 13.
Of water rights, see WATERS AND WATER COURSES, 2.

PRIVILEGE:

Words uttered in judicial proceeding, see LIBEL AND SLANDER, 1, 2.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 1.

PRIVITY:

Of parties at former trial, as affecting admission of evidence, see EVIDENCE, 10.

PROBATE COURTS:

See COURTS.

PROCESS:

On appeal, see APPEAL AND ERROR, 8, 9.

1. PROCESS — NECESSITY — KNOWLEDGE OF INSTITUTION OF ACTION. Knowledge of the pendency of an action to foreclose a lien would not be sufficient to give a court jurisdiction to render judgment binding upon a person not served with process. *Interior Warehouse Co. v. Hays* 507

PROFITS:

Damages for prospective profits, see SALES, 4.

PROMISSORY NOTES:

See BILLS AND NOTES, 4.

PROOF:

By homestead claimant, see PUBLIC LANDS, 2.

PROPERTY:

See FIXTURES.
Adverse possession, see ADVERSE POSSESSION.
Surrender by sheriff as working cessation of controversy, see APPEAL AND ERROR, 3.
Liability of mandatary for loss of, see BAILMENT.
Damages for flooding, see DAMAGES, 2.

PROPERTY—CONTINUED.

Taking or damaging for public use, see EMINENT DOMAIN.
Rescission of trade of, see EXCHANGE OF PROPERTY.
Fraud inducing trade of, see FRAUD, 2.
Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.
Separate property of wife, see HUSBAND AND WIFE, 1-4.
Wrongful execution, see SHERIFFS AND CONSTABLES.
Valuation for taxation, see TAXATION, 1-3.

PROSTITUTION:

1. PROSTITUTION—PUNISHMENT—EXCESSIVENESS. A sentence of four years' confinement in the state reformatory against a man convicted of receiving compensation for causing a female to cohabit with others than her husband is not so unreasonable as to show abuse of the court's discretion. *State v. Roberts*..... 560

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 3.

PROXIMATE CAUSE:

Of injury, see NEGLIGENCE, 1.

PUBLIC DEBT:

See STATES.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 3-18.
Statutes relating to, see STATUTES, 1, 3-5.

PUBLIC LANDS:

Condemnation of, see EMINENT DOMAIN, 1-3.
Acquired by Indians, see INDIANS.

1. PUBLIC LANDS—GRANT TO RAILROAD—RIGHT OF WAY—NATURE—RELATION. Act of Congress of July 2, 1864, granting a right of way to the Northern Pacific Railroad Company over public lands is a grant *in praesenti*, taking effect by relation as of that date, upon definite location of the line, as against settlers acquiring public lands after the grant and before the location of the line. *Northern Pac. R. Co. v. McDonald*..... 113

2. PUBLIC LANDS—HOMESTEADS—TITLE—FINAL PROOF—PATENT. The title of the government passes to a homestead claimant at the time of making final proof, and such is the effect of the patent, though issued thereafter; and not at the time when the claimant's right to make proof matured. *Robinson v. Steele*..... 268

PUBLIC POLICY:

Contract exempting irrigation company from negligence, see WATERS AND WATER COURSES, 3.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WORKS:

Contractor's bonds, see PRINCIPAL AND SURETY.

PUNISHMENT:

See PROSTITUTION.

QUALIFICATIONS:

Of officers, see MUNICIPAL CORPORATIONS, 2.

QUESTION FOR JURY:

Privilege in uttering words in judicial proceeding, see LIBEL AND SLANDER, 2.
Contributory negligence of servant, see MASTER AND SERVANT, 18, 19.
Scope of servant's employment, see MASTER AND SERVANT, 21.
In action for injury to child struck by ice falling from delivery wagon, see MUNICIPAL CORPORATIONS, 26, 27.
Fact and degree of comparative negligence, see NEGLIGENCE, 6.
In action for wrongful death of automobile driver at highway crossing, see RAILROADS, 2, 5.
Negligence in allowing spread of fire, see RAILROADS, 7.

QUIETING TITLE:

See FRAUDULENT CONVEYANCES.
Effect of judgment as against Indians alienating land prior to period of limitation, see INDIANS, 3.
Bar of action by statute, see LIMITATION OF ACTIONS, 1.

1. QUIETING TITLE—EVIDENCE—DEEDS—ADMISSIBILITY. Where plaintiff, upon purchasing land, took title in the name of his father, to whom the deed was delivered, and subsequently took another deed to the defendant, in an action to quiet title against defendant, the prior deed is admissible as part of the history of the transaction and to show that defendant acquired no title. *Anderson v. Hall*.... 376

QUO WARRANTO:

Finality of order requiring filing of action, see APPEAL AND ERROR, 2.

RAILROADS:

Occupation of right of way as conferring title, see ADVERSE POSSESSION, 2.
Carriage of goods and passengers, see CARRIERS.
Appropriation of property, see EMINENT DOMAIN, 1-3.
Grants of land in aid, see PUBLIC LANDS, 1.
In city streets, see STREET RAILROADS.

1. RAILROADS—NEGLIGENCE—VIOLATION OF STATUTE. Failing to sound the bell or whistle continuously until a crossing is reached, as re-

RAILROADS—CONTINUED.

quired by Rem. & Bal. Code, § 2528, is negligence as a matter of law. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

2. SAME—INJURY AT CROSSINGS — SIGNALS — NEGLIGENCE — QUESTION FOR JURY. Whether a bell was rung continuously until a crossing was reached, is a question for the jury where several witnesses testified that they did not hear the bell, although the engineer and fireman and a passenger testified that it was rung. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

3. SAME—INJURY AT CROSSINGS—NEGLIGENCE—EXISTENCE OF OBSTRUCTIONS. Where a building on the right of way at a crossing obstructs the view of the track, the existence of the obstruction is an element to be taken into consideration and imposes a like degree of care on the company and the public. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

4. SAME — INJURY AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — EVIDENCE—SUFFICIENCY. The driver of an automobile is guilty of contributory negligence as a matter of law, in attempting to cross ahead of a train, where he had an unobstructed view of the track for 450 feet, after emerging from behind a building 18 or 20 feet from the track, the train was in view one to three hundred feet away, and he was going at a speed of between ten and fifteen miles an hour up grade on intermediate gear and could have stopped within five feet. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

5. SAME—INJURY AT CROSSING—NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE—QUESTION FOR JURY. Whether a train crew was guilty of negligence in not discovering an automobile stalled on a crossing in time to have stopped the train is a question for the jury, where it appears that the crossing was a dangerous one, that the automobile approached on the side of the fireman, who was not keeping a lookout and did not see it until the engineer applied the brakes, and the train stopped within 136 feet and 18 feet after passing the crossing, and the testimony was in conflict. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

6. SAME—INJURY AT CROSSING—LAST CLEAR CHANCE—INSTRUCTIONS. In an action for wrongful death, when a train struck an automobile stalled on a crossing, an instruction on the doctrine of last clear chance is proper where the jury is told that the contributory negligence of the deceased must have culminated in the situation of peril from which by ordinary care on his part he could not extricate himself, and that the train crew, by the use of reasonable care, should have discovered the stalled automobile in time to have stopped the train. *McKinney v. Port Townsend & Puget Sound R. Co.*..... 387

7. RAILROADS—FIRES—NEGLIGENCE — EVIDENCE — QUESTION FOR JURY. In an action for damages for fire negligently communicated, a ques-

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tion for the jury was presented, though no testimony as to eye-witnesses of actual communication, where there was evidence of a fire on defendants' land, one arising on plaintiffs' land a few hours later, a strong wind from the former in the direction of the latter, and continuous scars of devastation between the two places, even though there was a possibility of communication from independent fires in the neighborhood. *McCann v. Chicago, Milwaukee & Puget Sound R. Co.*..... 626

8. RAILROADS—FIRES—INSTRUCTIONS. In an action for negligently communicating fire to plaintiffs' timber, a requested instruction for the jury to find for defendants, if they should find that plaintiffs' timber caught fire from other fires and was certain to be burned though the two fires might have mingled before they reached plaintiffs' land, was properly refused, where the jury was instructed to take into account the other fires, and that the burden was on plaintiffs to trace defendants' fire to their own premises and show that their fire was caused by defendants' particular fire and none other. *McCann v. Chicago, Milwaukee & Puget Sound R. C.*..... 626

RATIFICATION:

Of act of agent, see PRINCIPAL AND AGENT, 3.

REAL ESTATE:

Powers of foreign corporation to deal in, see CORPORATIONS, 14, 15.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Conveyance by nuncupative will, see WILLS, 2.

REASSESSMENT:

See MUNICIPAL CORPORATIONS, 9-18; STATUTES, 1.
Conclusiveness of first, see JUDGMENT, 2, 3.

REBATES:

Of assessment for improvement, see MUNICIPAL CORPORATIONS, 13, 18.

RECEIVERS:

Validity of chattel mortgage without affidavit of good faith, as against receiver for corporation, see CORPORATIONS, 13.

RECORDS:

On appeal, see APPEAL AND ERROR, 10, 11.
Of proceedings to confirm establishment of irrigation district, see WATERS AND WATER COURSES, 9, 10.

REDUCTION:

Of excessive assessment, see TAXATION, 1-3.

REENACTMENT:

Of statute, see STATUTES, 1.

RELIANCE:

On statements made to induce trade of property, see EXCHANGE OF PROPERTY, 4, 6.

REMOVAL:

Of corporate officers and servants, see CORPORATIONS, 8.
Of trade fixtures from building, see FIXTURES, 3, 4.
Judgment removing limitation on power to alienate lands, validity, see INDIANS.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

REPEAL:

Of statute, see STATUTES, 1.

REPLEVIN:

Amount in controversy governing jurisdiction on appeal, see APPEAL AND ERROR, 1.
To recover property sold for taxes, see TAXATION, 4.

RESALE:

Of goods, see SALES, 1.

RESCISSION:

Of sale of corporate stock, see CORPORATIONS, 4, 5.
Of trade of lands, see EXCHANGE OF PROPERTY.
Of contract for sale of land, see VENDOR AND PURCHASER, 1-7, 16.
Venue of action for rescission of trade of lands, see VENUE.

RESERVATION:

Of title to fixtures in bill of sale, see FIXTURES, 2.

RESERVE:

Application of reserve fund for extension of insurance on lapse of policy, see INSURANCE, 6-9.

RES GESTAE:

In civil actions, see EVIDENCE, 2.

RES IPSA LOQUITUR:

See NEGLIGENCE, 4.

RES JUDICATA:

See JUDGMENT, 2, 3.

RESULTING TRUSTS:

See TRUSTS.

RETENTION:

Of money for purpose of paying claims against contractor, see MUNICIPAL CORPORATIONS, 3, 5.

RETURN:

Of execution, see EXECUTION.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.
In criminal prosecution, see CRIMINAL LAW, 5.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 1.
Liability of upper proprietor for acts of independent contractor in use of splash dams, see MASTER AND SERVANT, 22.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 15-17.
Assumption of by licensee, see NEGLIGENCE, 3.

ROADS:

See HIGHWAYS.
Streets in cities, see MUNICIPAL CORPORATIONS, 7, 19-27.

SALARY:

Of game wardens, see COUNTIES, 2, 3.
Mandamus to compel issuance of salary warrant for game wardens, see MANDAMUS.
Of city officer, see MUNICIPAL CORPORATIONS, 2.
Of officers, see OFFICERS.

SALES:

Of corporate stock, see CORPORATIONS, 1-7.
On execution, see EXECUTION.
Reservation of title to fixtures in bill of sale, see FIXTURES, 2.
Of intoxicating liquors, see INTOXICATING LIQUORS.
Of lumber subject to labor liens, see LOGS AND LOGGING.
Recovery of property sold for taxes, see TAXATION, 4.
Tender in action to recover purchase price, see TENDER.

SALES—CONTINUED.

Of realty, see VENDOR AND PURCHASER.
Of water rights, see WATERS AND WATER COURSES, 4, 5.

1. SALES—CONTRACT—RESALE—CONSTRUCTION. A sale of goods authorizing the buyer to "return the goods" to the sellers and obtain credit contemplates a resale requiring delivery to pass title; and the title does not pass by delivery to a local transfer company for reshipment to the sellers at Chicago, in the absence of any bill of lading or notice and acceptance; since the carrier was the buyer's agent and the goods were subject to his control, and liable to attachment. *Meyer v. Hodge*..... 35

2. SALES — GOODS NOT ORDERED — ACCEPTANCE — RECOVERY OF MONEY PAID. There can be no recovery for a sum paid for a carload of goods received, some of which were not ordered, where notice of rejection was not given within a reasonable time, and part of such goods were resold in the regular course of business, as there was an acceptance. *Cuschner v. Pittsburgh-Hickson Co*..... 371

3. SAME—GOODS NOT DELIVERED—RECOVERY OF MONEY PAID. Where a carload of furniture included goods not ordered but which were accepted, there can be no recovery of goods ordered but not shipped unless the value thereof exceeded the reasonable value of the accepted goods in the car. *Cuschner v. Pittsburgh-Hickson Co*.... 371

4. SALES—DAMAGES TO BUYER—PROSPECTIVE PROFITS—PROOF. In an action for damages through delay in filling an order for a carload of furniture, the evidence of the plaintiff and one of his salesmen that, if the goods had been received in time, they could have been sold at a profit of $650, amounts to no more than an opinion or guess, and is insufficient to sustain a verdict for substantial damages; as prospective profits must be shown with reasonable certainty. *Cuschner v. Pittsburgh-Hickson Co*..... 371

5. SALES—WARRANTY—BREACH—EVIDENCE—SUFFICIENCY. The mere fact that seeds, sold upon express warranty as to their germinating quality, did not grow when planted in good soil, is not sufficient to show a breach of the warranty, where a germination test before sale showed that the seeds were good, and the buyer kept them too long in water and placed them on ice allowing the ice to melt, which tended to prevent germination. *Meehan v. Ingalls*..... 86

6. SALES—CONDITIONAL SALES — DELIVERY — SEPARATE PARTS — STATUTES. Where, upon delivery of the principal part of a mangle, substantial parts consisting of a shaft and roller were found missing, and such parts were delivered with reasonable dispatch and there was no bad faith, the filing of a conditional sales contract within ten days after delivery of the completed machine is within time, under Rem. & Bal. Code, § 3670, providing that a conditional sale shall be absolute as to creditors unless within ten days after taking

SALES—CONTINUED.

possession by the vendee a memorandum of the sale shall be filed for record in the auditor's office. *Anderson v. Langford*..... 176

7. SALES—CONDITIONAL SALES—NOTE GIVEN AS CONSIDERATION. The promissory note of a third party, given as the equivalent of cash in making preliminary payment on a conditional sale contract between a vendor and purchaser, is based upon a valid consideration, and hence subject to enforcement by the vendor on a recission of the contract and a retaking of the property upon the default of the purchaser. *Norman v. Meeker*..... 534

8. SALES — CONDITIONAL SALES — REMEDIES OF VENDOR — ELECTION. Upon default by the vendee of a conditional sale contract, the vendor has an election either to disaffirm the contract and retake the property, or to affirm the contract, declare the subsequent payments due, and sue for the purchase price. *Norman v. Meeker*..... 534

SEDUCTION:

1. SEDUCTION—UNCHASTITY—EVIDENCE—ADMISSIBILITY. In a prosecution for seduction, a witness for the defense called to establish the unchastity of the prosecuting witness, who admitted that he had tried to have sexual intercourse with her, may be properly asked to state what he did. *State v. Kellogg*..... 665

SENTENCE:

See PROSTITUTION.

SEPARATE ESTATE:

Of spouse, see HUSBAND AND WIFE, 1-4.

SERVICE:

Of process, see PROCESS.

SERVICES:

Of officer, see OFFICERS.

SET-OFF AND COUNTERCLAIM:

Effect of dismissal of action on appeal, see DISMISSAL AND NONSUIT.

SETTLEMENT:

See PARTNERSHIP; PAYMENT.

SETTLERS:

On public lands, see PUBLIC LANDS.

SHERIFFS AND CONSTABLES:

Correction of sheriff's return on execution, see EXECUTION.

1. SHERIFFS AND CONSTABLES — WRONGFUL EXECUTION — LIABILITY. Where a sheriff takes property from the possession of one not a

SHERIFFS AND CONSTABLES—CONTINUED.

party to the judgment, he is liable for the seizure, though acting under an execution issued on the judgment. *Interior Warehouse Co. v. Hays*..... 507

SIDEWALKS:

Injuries from ice and cinders, see MUNICIPAL CORPORATIONS, 30, 31.

SIGNALS:

On approaching crossing, see RAILROADS, 1, 2.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

Of contract for trade of properties, see EXCHANGE OF PROPERTY, 1.

1. SPECIFIC PERFORMANCE — PLEADING — JUDGMENT ON PLEADING—EXCHANGE OF PROPERTIES. In an action for the specific performance of a contract for the exchange of properties, the pleadings do not entitle plaintiff to judgment on the theory that defendants are shown to be willing to make the exchange, where it appears that plaintiffs were unable to perform at the time of the readiness of the defendants, that the parties then verbally rescinded, and defendants had since improved their property and changed their position on account of the verbal rescission. *Stoner v. Fryett*..... 89

SPLASH DAMS:

Liability of upper proprietor for acts of independent contractor in use of, see MASTER AND SERVANT, 22.

STATES:

Regulation and control of corporations, see CORPORATIONS, 15.
Condemnation of state lands, see EMINENT DOMAIN, 1-3.
County or state officers, see GAME.

1. STATES—PUBLIC DEBT—POWER TO CONTRACT—INTEREST ON BONDS—STATUTES. Laws 1915, p. 700, § 3, of the act for bonding the capitol building lands for $1,500,000, the principal payable only from the capitol building fund derived from the sale of the lands, which provides for the levy of an annual tax sufficient to meet the interest on the bonds, the same to be deemed a loan from the general fund and repaid from the proceeds of sales or leases of capitol building lands, is unconstitutional as the creation of a "debt" for such interest charges, within the meaning of Const., art. 8, § 3, providing that no debts except as specified, shall hereafter be contracted on behalf of the state unless authorized by law for some specified object, which law shall provide ways and means, exclusive of loans, for the payment of interest on such debt as it falls due, and also to discharge

STATES—CONTINUED.

the principal of such debt within twenty years, and shall be submitted to a vote of the people at a general election; since the interest is not payable from the same source as the principal, but is to be raised by an annual tax, in the "same manner as other state levies are made," in violation of the purpose of the constitution to prevent the taxpayers from being assessed therefor unless authorized by a vote of the people. *State ex rel. State Capitol Commission v. Lister*..... 9

2. SAME. The proceeds of the capitol building lands cannot be considered as an asset equivalent to cash for the purpose of meeting such interest charge. *State ex rel. State Capitol Commission v. Lister*..... 9

3. SAME. The bonding of the state capitol lands for the purpose of erecting buildings and creating a "debt" for interest charges, without submitting the same to a vote of the people, in violation of the constitution, cannot be sustained on the principle authorizing municipal corporations to exceed their debt limit for the purpose of meeting necessary obligations, as the same is not applicable. *State ex rel. State Capitol Commission v. Lister*..... 9

STATUTES:

See EMINENT DOMAIN, 1, 4; PERJURY.
Relating to game commissions and wardens, see COUNTIES.
Admissibility of evidence given at former trial, see EVIDENCE, 9.
Appointment of game wardens and commissions, see GAME.
Costs and attorney's fees in garnishment, see GARNISHMENT.
Limitation on alienation of homestead, see INDIANS.
Venue of action on insurance policy, see INSURANCE, 10.
Of limitation, see LIMITATION OF ACTIONS.
Workmen's compensation act, see MASTER AND SERVANT, 1-9.
Assessment for public improvements, see MUNICIPAL CORPORATIONS, 9-11, 14.
Right to intervene in action, see PARTIES.
Duty to sound warning on approaching crossing, see RAILROADS, 1.
Power of state to contract debts, see STATES, 1.
Assessment of property for taxation, see TAXATION, 3.
Right to make will, see WILLS, 1.
Conveyance of real property by will, see WILLS, 2.

1. STATUTES — REENACTMENT — CONSTRUCTION — MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REASSESSMENTS. The act of 1911 (3 Rem. & Bal. Code, § 7892-1 *et seq.*) relating to local improvements by cities, having carried forward the provisions relating to reassessments, is not to be construed as a new enactment, but as a continuing law from the first amendment in 1893; especially in view of Id., § 7892-70, providing that acts repealed which are reenacted in form

STATUTES—CONTINUED.

or substance shall be construed as continuations or amendments, and saving all proceedings pending under the old law. *Kuehl v. Edmonds*..... 195

2. STATUTES—TITLE AND SUBJECTS—INSURANCE CODE. The title "An act to provide an insurance code . . ." is broad enough to include 3 Rem. & Bal. Code, § 6059-13½, covering the venue of actions on insurance policies and the manner of service of summons therein; since the act, being a complete code on the subject of insurance, the title need not be an index to the act. *Davis-Kaser Co. v. Colonial Fire Underwriters Insurance Co*..... 383

3. STATUTES—TITLE AND SUBJECTS. The title "An act relating to local improvements, and repealing" certain acts is sufficient to embrace a section regulating the procedure in actions to foreclose liens for local assessments; the term "local improvements" being inclusive of the subject of local assessments. *Holzman v. Spokane*.. 418

4. SAME. The restrictions of 3 Rem. & Bal. Code, § 7892-40, upon the rights of lien holders of certificates of delinquency for general taxes, requiring them to pay all outstanding local assessments, is germane to the title of the act—"An act relating to local improvements." *Holzman v. Spokane*..... 418

5. SAME—TITLE AND SUBJECTS—AMENDMENTS. 3 Rem. & Bal. Code, § 7892-40, of the local improvement act, which requires lien holders of certificates of delinquency for general taxes to pay outstanding local assessments, is not unconstitutional as amending or revising 2 Rem. & Bal. Code, § 9262, permitting such lien holders to foreclose tax certificates upon paying accrued general taxes only, without setting out in full the section amended, as required by Const., art. 2, § 37. *Holzman v. Spokane*..... 418

6. STATUTES—CONSTRUCTION. When not defined by statute, terms having a well defined meaning at common law will be given that construction. *Irwin v. Rogers*..... 284

STENOGRAPHERS:

Notes of testimony of absent witness, given at former trial as evidence, see EVIDENCE, 12.

STOCK:

Corporate stock, see CORPORATIONS, 1-7, 11.

Accrual of action on unpaid stock subscription, see LIMITATION OF ACTIONS, 4.

Taxation of capital stock, see TAXATION, 1.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-7.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

1. STREET RAILROADS—FRANCHISE—ALTERATION. Laws 1889-90, p. 183, § 117, giving municipal corporations power to grant franchises for the use of their streets confers no authority for the alteration of such franchises subsequent to their grant so as to impose additional obligations on the holder in the matter of street paving differing from the conditions of the franchise contract. *State ex rel. Olympia v. Olympia Light & Power Co*..... 519

2. STREET RAILROADS—FRANCHISES — PAVING REQUIREMENTS. Under ordinance No. 397 of the city of Olympia granting a franchise to a street railway company to lay its tracks in the city streets and plank within the rails and for eighteen inches outside the rails, with the option of adopting such pavement of a permanent character as the city may employ in paving the street, the city has no power to require the company to pave with other material than planking, notwithstanding a provision of the ordinance reserving to the city the right to amend or alter the franchise, "having due regard for the vested rights" of the grantee. *State ex rel. Olympia v. Olympia Light & Power Co*..... 519

3. STREET RAILROADS—PAVING—CONSTRUCTION OF FRANCHISE. Under an ordinance granting an extension of a street railway franchise over a portion of the street theretofore not included, and providing that the grantee "shall maintain such paving between the rails of the railway and to a distance of eighteen inches on each side of the same as shall be used by the city in the paving of Fourth street along the line of this road," the term "maintenance" is to be construed as meaning "maintain after construction," in view of the fact that the ordinance further provides that the right of extension shall be subject to the terms of the original franchise wherein it was provided that the city retained power to pave all streets over which the company might extend its lines, but all such work should be done so as to offer as little obstruction as possible to the operation of the railway. *State ex rel. Olympia v. Olympia Light & Power Co*..... 519

4. STREET RAILROADS — PAVING — MUNICIPAL POWERS. Cities of the third class are without delegated power, in the absence of express statute, to require railway companies that have constructed their tracks and are operating cars thereon to pave or improve any part of the street on which they are laid. *State ex rel. Olympia v. Olympia Light & Power Co*..... 519

5. STREET RAILROADS — POLICE POWER — STREET PAVING. The police power authorizing a municipality to require a street railway company to keep its tracks in safe condition for the public welfare cannot be extended so as to require the company at its own expense to pave with other material than that laid by it under its franchise contract. *State ex rel. Olympia v. Olympia Light & Power Co*.. 519

STREETS:

See MUNICIPAL CORPORATIONS, 7, 19-27.

SUBROGATION:

1. SUBROGATION—PAYMENT OF LIENS—RIGHTS OF MORTGAGEE—WHEN VOLUNTEER. Upon failure of proof as to the execution of a mortgage, in a foreclosure action, plaintiff is not entitled to subrogation to the extent that money obtained on the mortgage was used to discharge liens on the property; as he was but a volunteer in paying taxes and judgment liens to clear the title for the benefit of his security. *Wagner v. Alderson* 157

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 1-7.

Accrual of action on unpaid stock subscription, see LIMITATION OF ACTIONS, 4.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURPRISE:

In examination of witness, see WITNESSES, 3.

SURRENDER:

Of property by sheriff as working cessation of controversy, see APPEAL AND ERROR, 3.

Removal of trade fixtures on surrender of lease, see FIXTURES, 3, 4.

SURVEYS:

Judicial notice of, see EVIDENCE, 1.

SUSPENSION:

Of interest by tender of principal before suit, see INTEREST.

TAXATION:

Rights and duties of lien holders of certificates of delinquency, see STATUTES, 3-5.

Right of mortgagee to subrogation on paying taxes, see SUBROGATION.

Defects cured by tax title, see VENDOR AND PURCHASER, 8.

Unpaid taxes as affecting title of vendor, see VENDOR AND PURCHASER, 9.

1. TAXATION—ASSESSMENT—EXCESSIVE VALUATION—FRAUD. The assessment of the capital stock of a bank at sixty per cent of its actual value according to the basis adopted by the assessor for all personal property assessable for the year will not be set aside as

TAXATION—CONTINUED.

constructively fraudulent, although for the same year real estate, under the biennial assessment of the preceding year, was assessed at only forty-five per cent of its value. *First National Bank of Monroe v. Snohomish County*..... 513

2. TAXATION—ASSESSMENT—MINING LANDS—OVERVALUATION—REDUCTION. An assessment of 141.7 acres of mineral land for various years at $80,000 to $40,000 will be reduced as grossly inequitable and palpably excessive and hence constructively fraudulent, where it appears that the vein or lode of paying ore has either been completely exhausted or so hopelessly lost as to make the property not an operating mine but a mere prospect, with no paying ore in sight, while the assessment was based on a value as an operating mine and its past performances, and that its fair value as a prospect did not exceed from $50,000 the first year to $10,000 for subsequent years. *First Thought Gold Mines, Limited v. Stevens County*..... 437

3. TAXATION—ASSESSMENT—REVIEW—JUDGMENT — CONCLUSIVENESS—STATUTES. A judgment correcting an excessive valuation for an even numbered year and fixing the correct valuation, becomes the assessed valuation for the following year, and is final and binding upon the board of equalization, under Rem. & Bal. Code, § 9101, providing that the assessed valuation of real property for taxation in even numbered years shall remain the assessment in odd numbered years, where there are no changed conditions. *Simpson Logging Co. v. Chehalis County*..... 656

4. TAXATION—SALES—REMEDIES OF OWNER—ATTACK ON VOID SALES—TENDER. In replevin by a vendee to recover property conditionally sold, in which the defense was that the property had been sold for taxes alleged to be a valid lien, plaintiff's reply that the property was distrained and sold for the taxes of another who was never the owner of the property, is not an attack upon the validity of a tax, and so is not within Rem. & Bal. Code, §§ 955, 956, making tender of the tax justly due a condition precedent to an action to recover property sold for taxes. *Hill v. Calkins*..... 634

TENDER:

Of certificate for burial crypt, sufficiency, see CEMETERIES.
Of principal before suit, see INTEREST.
Of mortgage debt, see MORTGAGES, 2, 3.
Of tax in replevin by vendee to recover property conditionally sold, see TAXATION, 4.
Of interest payments on rescission of contract, see VENDOR AND PURCHASER, 2.

1. TENDER—KEEPING GOOD. Tender of a certificate for a cemetery crypt, not kept good by being brought into court, is not sufficient to sustain recovery upon a contract for the purchase price. *Mausoleum Sales Co. v. Morgan*..... 617

TESTAMENTARY CAPACITY:

See WILLS, 3, 4.

TIDE LANDS:

Condemnation of, see EMINENT DOMAIN, 1-3.
Extension of street over tide lands, see MUNICIPAL CORPORATIONS, 19.

TIME:

For presentment of check, see BILLS AND NOTES, 3.
For filing claim for damages, see MUNICIPAL CORPORATIONS, 28-30.
Filing conditional sales contract, see SALES, 6.
For delivery of deed, see VENDOR AND PURCHASER, 10, 11.
For demand for deed, see VENDOR AND PURCHASER, 12.

TIME CHECKS:

See BILLS AND NOTES, 2.

TITLE:

See ADVERSE POSSESSION.
To fixtures in hotel, see FIXTURES.
Limitation on alienation of title to lands held by Indians, see INDIANS.
To homestead, final proof, see PUBLIC LANDS, 2.
Removal of cloud, see QUIETING TITLE.
On sale of goods, when passes, see SALES, 1.
Statutes, see STATUTES, 2-5.
Of vendor, see VENDOR AND PURCHASER, 8, 9.
Conveyance of title to realty by will, see WILLS, 2.

TORTS:

See FRAUD; LIBEL AND SLANDER; TRESPASS; TROVER AND CONVERSION.
Carriage of passengers, see CARRIERS.
Measure of damages, see DAMAGES, 2-4.
Civil liability for sale of liquor, see INTOXICATING LIQUORS.
Of employers, see MASTER AND SERVANT.
Of city, see MUNICIPAL CORPORATIONS, 20, 28-31.
Agents, see PRINCIPAL AND AGENT, 1.

TRANSCRIPTS:

Allowance of costs for, see COSTS, 2.
Of evidence at former trial, admissibility, see EVIDENCE, 12.

TREES:

Wrongful trespass upon, damages, see TRESPASS.

TRESPASS:

1. TRESPASS—UPON TREES—TREBLE DAMAGES. Under Rem. & Bal. Code, § 939, allowing treble damages for wilful or wanton trespass upon trees "without lawful authority," and single damages if the

TRESPASS—CONTINUED.

act is "casual or involuntary," treble damages cannot be recovered for injuring ornamental trees which defendants were authorized to trim beyond menace to defendant's wires, although the authority was exceeded. *Tronsrud v. Puget Sound Traction, Light & Power Co*..... 660

2. TRESPASS—DAMAGES—MEASURE. The measure of damages for injuring ornamental trees is the diminished value of the land and not the diminished value of the trees. *Thronsrud v. Puget Sound Traction, Light & Power Co*..... 660

TRESPASSERS:

Injury to child struck by ice sliding from delivery wagon, see MUNICIPAL CORPORATIONS, 27.

TRIAL:

See NEW TRIAL.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 4-6.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 10, 11.

Review of findings, see APPEAL AND ERROR, 18.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 19-25.

Of criminal prosecution, see CRIMINAL LAW.

Evidence at former trial, see EVIDENCE, 9-12.

Right to trial by jury, see JURY.

Instructions in action for slander, see LIBEL AND SLANDER, 3.

Instructions in action for injuries in city street, see MUNICIPAL CORPORATIONS, 22.

Instructions as to comparative negligence, see NEGLIGENCE, 7.

Amendments at trial, see PLEADING, 2, 3.

Instructions in action for wrongful death at crossing, see RAILROADS, 6.

Instructions in action for damages caused by fire, see RAILROADS, 8.

Place of trial, see VENUE.

Instruction in action for damages for failure to supply water for irrigation, see WATERS AND WATER COURSES, 4.

1. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY. An objection to a witness' referring to a memorandum and stating certain items of expenditures, as "incompetent, irrelevant, and immaterial," is unavailing as an objection to testifying to the sums he had actually paid, instead of the sums "reasonably" expended. *Evergreen Farm v. Attalia Land Co*..... 192

2. TRIAL—RECEPTION OF EVIDENCE—DOCUMENTARY—READING TO JURY. A document properly introduced in evidence may be read to the jury either by the party himself or by his attorney, where there are no

TRIAL—CONTINUED.

explanations by the witness other than identification of items mentioned therein. *Palmer v. Parker*..... 683

3. TRIAL — PROVINCE OF COURT AND JURY — DIRECTING JUDGMENT — GARNISHMENT. Where, in garnishment proceedings, there is substantially no dispute on any of the facts, the court is warranted in taking an issue from the jury and directing judgment. *Puget Sound Iron & Steel Works v. First International Bank*..... 109

4. TRIAL—INSTRUCTIONS—AS A WHOLE. An instruction founded upon a pedestrian's right of way at a street crossing under a city ordinance, must be read in connection with other instructions giving vehicles the right of way between crossings, as the instructions must be considered as a whole. *Yanase v. Seattle Taxicab & Transfer Co*..... 415

5. TRIAL—INSTRUCTIONS—COMMENT ON FACTS. It is not an unlawful comment on the facts, in an action for attorney's fees, in which the burden was upon defendant to prove his affirmative defense of payment of $7,500 in full for past and for future services, to instruct the jury "to entirely disregard said payment of $7,500," if they do not believe by a fair preponderance of the evidence that such sum was intended to cover the future services. *Palmer v. Parker*... 683

6. TRIAL—FINDINGS—NECESSITY. Findings of fact and conclusions of law are not essential in an equity case tried *de novo* on appeal. *Soboda v. Nolf & Co*..... 446

7. TRIAL—WAIVER OF ERROR—NONSUIT. Error in denying a nonsuit is not cured by waiver of defendant in going into the defense without offering evidence to strengthen plaintiff's case. *Fraser v. Home Telephone & Telegraph Co*..... 253

TROVER AND CONVERSION:

1. TROVER AND CONVERSION—REMEDIES—IMPLIED CONTRACT. Upon the conversion of a note, the owner may waive the tort and recover its value, as upon an implied contract to pay the same. *Cremidas v. Dallas*..... 441

2. SAME—EVIDENCE—VALUE OF NOTE—PRESUMPTIONS. In an action upon an implied contract to pay the value of a note converted by the defendant, the presumption, in the absence of proof to the contrary, is that it was of the value shown upon its face; and such presumption is not overcome by proof that the note was overdue and in the hands of a bank for collection. *Cremidas v. Dallas*..... 441

TRUSTS:

Engaging in trust business, see CORPORATIONS, 12.

Liability of trustee for costs in action for accounting of fund, see COSTS, 1.

TRUSTS—CONTINUED.

1. TRUSTS—RESULTING TRUSTS—DEEDS. The execution of a deed by plaintiff to defendant without other consideration than contemplation of marriage, and its subsequent recordation by plaintiff, vests no more than bare title in the defendant; and a resulting trust exists in favor of plaintiff, where the deed was never delivered and it was all done without the knowledge of defendant, at a time when plaintiff, already married, could make no valid contract to marry defendant and defendant broke off the engagement. *Anderson v. Hall*..... 376

UNDERWRITERS:

Of stocks and bonds, see CORPORATIONS, 9-11.

UNLAWFUL DETAINER:

Right of administrator *de bonis non* to prosecute action, see EXECUTORS AND ADMINISTRATORS, 5.

VALUATION:

Of property for taxation, see TAXATION, 1-3.

VARIANCE:

Between pleading and proof in civil action, see PLEADING, 6.

VENDOR AND PURCHASER:

Sales of property by broker, see BROKERS.

Sale of burial crypt, see CEMETERIES.

Limitation of action for recission of contract for fraud, see LIMITATION OF ACTIONS, 2.

Transfer of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER—MISREPRESENTATION OF VENDOR—CAVEAT EMPTOR. The rule of *caveat emptor* should not be extended so as to deny remedy to an improvident purchaser against false representations accompanied with unconscionable gains on the part of a fraudulent vendor. *Gordon v. Hillman*..... 490

2. VENDOR AND PURCHASER—RESCISSION—TENDER OF INTEREST. Upon seeking rescission, failure to tender interest payments made by defendants would not defeat a judgment for plaintiffs, especially where the payments were nominal in amount and were taken care of in the decree of the court. *Gordon v. Hillman*..... 490

3. VENDOR AND PURCHASER—RESCISSION BY VENDEE—ACTS CONSTITUTING. There are sufficient unequivocal acts of rescission by the purchasers where, upon discovery of failure of title, they timely refused to pay the balance due upon the first purchase money note at maturity, or other notes declared due, or to receive the deed tendered to them. *Robinson v. Steele*..... 268

VENDOR AND PURCHASER—CONTINUED.

4. VENDOR AND PURCHASER—REMEDIES OF VENDEE—RESCISSION—RECOVERY OF MONEY PAID—WAIVER. The giving of a mortgage by the vendors does not give the vendee the right to rescind an executory contract for the sale of lands; hence delay until foreclosure started does not amount to laches waiving the right of rescission and recovery of money paid. *Ihrke v. Continental Life Insurance & Investment Co.* 342

5. SAME—REMEDIES OF VENDEE—RESCISSION—WAIVER. The refusal of a vendee to make further payments on an executory contract for land, after the vendors prevented completion of the contract by putting it out of their power to convey, is not a default by the vendee which would forfeit the right to relief. *Ihrke v. Continental Life Insurance & Investment Co.* 342

6. SAME. The vendee's right to rescind an executory contract for the sale of land and recover money paid is not waived by failing to litigate the same in an action brought to foreclose a mortgage wrongfully placed on the lands of the vendors; since paramount title may not be litigated in a mortgage foreclosure. *Ihrke v. Continental Life Insurance & Investment Co.* 342

7. SAME—CONTRACT—MUTUAL COVENANTS—BREACH—RESCISSION. An agreement in an executory contract for land to convey a bearing orchard, to be planted and matured by the vendors prior to the payment of the last installment of the purchase price, is not an independent covenant, but the covenants were mutual and dependent, without separation in regard to the consideration, and breach of such clause is ground for rescission. *Ihrke v. Continental Life Insurance & Investment Co.* 342

8. VENDOR AND PURCHASER—CONTRACT—ABSTRACT SHOWING TITLE—CONSTRUCTION—DEFECTS CURED BY TAX TITLE. Since a contract calling for a warranty deed conveying good title, as shown by a complete abstract of title, only calls for a marketable title or one reasonably free from reasonable doubt, an abstract showing an independent title by the foreclosure of a general tax lien cures prior defects in the chain of title, including an ancient unreleased mortgage, where the statute of limitations has run against setting the tax title aside; in view of Rem. & Bal. Code, § 9230, making a general tax lien superior to all other liens, and Id., § 162, starting the running of the statute of limitations against the same. *Wilson v. Korte* 30

9. SAME—CONTRACTS—ABSTRACT—DEFECTS — UNPAID TAXES. A vendor's contract to convey free and clear of all incumbrances is not breached by the existence of unpaid taxes prior to the delivery of the deed, which was not forthcoming until the full purchase price was paid, since they were then removable; nor where the parties submitted the title to adjudication and the taxes were paid before the trial. *Wilson v. Korte* 30

VENDOR AND PURCHASER—CONTINUED.

10. SAME—CONTRACT — CONSTRUCTION — PERFORMANCE — REASONABLE TIME FOR DEED. Where defendants, being the holders of a contract for county lands which they had contracted to convey to N. & H., assigned the latter contract to plaintiff, the assignment reciting that the defendants would perfect title to the lands and pay the amounts due on the contract, and defendants admitted that they were to make deed to N. & H. (then in default) or to plaintiff if N. & H. failed to perform, the plaintiff is entitled to a deed from defendants within a reasonable time, and nine months after demand for a deed is such reasonable time. *Merritt v. McLane*..... 99

11. VENDOR AND PURCHASER—CONTRACT—TIME FOR DELIVERY OF DEED. Where defendant admits that he was to furnish plaintiff a deed, although the contract failed to provide therefor, the court is justified in finding that he was to furnish a deed within a reasonable time. *Merritt v. McLane*..... 99

12. VENDOR AND PURCHASER—CONTRACT—REMEDIES OF PURCHASER—DEMAND FOR DEED. Under an installment contract for land, entitling the purchaser, after paying one-fourth or more of the price, "at the expiration of five years from the date of the contract," to a deed for a proportionate part of the land, a demand for a proportional deed made two days after the expiration of the five years is in time, as it is approximately at the expiration of the contract. *Johnson v. Arcadia Orchards Co*..... 289

13. SAME — REMEDIES OF PURCHASER — CONTRACT — CONSTRUCTION — BREACH—DAMAGES. Under a contract for five acres of land at the agreed price of $2,000, entitling the purchaser, after paying one-fourth or more of the price, to a deed for a proportionate part upon ceasing payments, "except that no fractional part of an acre shall be deeded under this provision," the purchaser, upon breach by the vendor, in refusing to deed one acre after the payment of $500 and interest, may elect to recover damages, but being entitled to but one acre, can recover as damages only the agreed upon price therefor, or $400, with interest from the time of ceasing to pay. *Johnson v. Arcadia Orchards Co*..... 289

14. VENDOR AND PURCHASER—CONTRACTS—BREACH—REMEDIES OF VENDEE—LIEN FOR MONEY PAID. Where the completion of an executory contract for the sale of land is prevented by the default or wrongful act of the vendors, who have put it beyond their power to convey, the vendee is entitled to a lien upon the land for the amount paid on the purchase price, as against the vendors and subsequent purchasers with notice. *Ihrke v. Continental Life Insurance & Investment Co.* 342

15. SAME. The right to such a lien is not affected by the fact that, in this state, there is no vendor's lien upon the lands for unpaid

VENDOR AND PURCHASER—CONTINUED.

purchase money. *Ihrke v. Continental Life Insurance & Investment Co.* 342

16. SAME. The refusal of a vendee to make further payments on an executory contract for land, after the vendors prevented completion of the contract by putting it out of their power to convey, and the commencement of a suit for rescission and damages, does not constitute such a rescission of the contract as to prevent the vendee from claiming a lien on the land for the amounts paid on the purchase price. *Ihrke v. Continental Life Insurance & Investment Co.* 342

VENUE:

Of action on foreign fire insurance policy, see INSURANCE, 10.

Of action on insurance policy, title and subject of insurance code, see STATUTES, 2.

1. VENUE—REAL PROPERTY—RESCISSION—LANDS IN TWO COUNTIES—CHANGE OF VENUE. An action for the rescission of a trade of lands located in M. county for lands in K. county is as much local to K. county as to M. county where the action was brought, and it is not error to grant a change of venue to K. county. *Wilson v. Mills* 71

VERDICT:

Inadequate or excessive damages, see DAMAGES, 3, 4; INTOXICATING LIQUORS, 4; LIBEL AND SLANDER, 5.

VOLUNTEER:

Duty owed to volunteer, see NEGLIGENCE, 3.

Right to subrogation on paying liens and taxes, see SUBROGATION.

VOTERS:

Submission of bond issue of state capitol lands to vote of people, see STATES.

WAIVER:

See ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 12, 13.

Of rights by broker, see BROKERS, 1.

Jury trial, see JURY.

Failure of owners to object to assessment for improvement, see MUNICIPAL CORPORATIONS, 13.

Of duty to file claim against bond of contractor on public work, see PRINCIPAL AND SURETY.

Of error in denying nonsuit, see TRIAL, 7.

Of tort, see TROVER AND CONVERSION, 1.

Of right to rescind contract, see VENDOR AND PURCHASER, 4-6.

Of right to privilege, see WITNESSES, 1.

WARNING:

Duty of automobile driver to sound warning at street intersections, see MUNICIPAL CORPORATIONS, 24.

Failure to sound warning at crossing, see RAILROADS, 1, 2.

WARRANTS:

Mandamus to compel issuance of county warrants for salary of game wardens, see MANDAMUS.

WARRANTY:

By insured, see INSURANCE, 4, 5.

On sale of goods, see SALES, 5.

WATERS AND WATER COURSES:

Condemnation of state water way, see EMINENT DOMAIN, 1-3.

Liability of upper proprietor for acts of independent contractor in use of splash dams, see MASTER AND SERVANT, 22.

1. WATERS AND WATER COURSES—RIPARIAN RIGHTS—PUBLIC WATER SUPPLY. The use of waters to supply the inhabitants of a town with water for domestic purposes is not a riparian right, and no recovery for damages to such use can be based upon rights as riparian owners. *Cartier Van Dissel v. Holland-Horr Mill Co*..... 239

2. WATERS AND WATER COURSES — PRIVATE DITCH — PRESCRIPTIVE RIGHTS—EASEMENTS—LICENSE TO USE. Plaintiffs can gain no prescriptive right to an easement in a ditch on defendant's adjoining land diverting water controlled and used by defendants for their own use, from the fact that they used surplus waters from a pool formed near the boundary line and annually assisted in cleaning out the ditch, where such use was not exclusive and they evidently were mere licensees, and there was no evidence from which a certain flow could be assigned to them. *Lyons v. Ingle*..... 179

3. WATERS AND WATER COURSES—IRRIGATION COMPANY—NEGLIGENCE —EXEMPTION BY CONTRACT—PUBLIC POLICY. An irrigation company cannot exempt itself from negligence by contracts for supplying water limiting its liability to cases of gross negligence, as it would be against public policy. *Evergreen Farm v. Attalia Land Co*... 192

4. WATERS AND WATER COURSES—IRRIGATION—CONTRACT — BREACH — ACTION FOR DAMAGES—INSTRUCTIONS. In an action for damages for failure to supply water for the irrigation of lands, in which the answer raised the issue that plaintiff's damage was due to his fault in failing to receive and properly care for the water delivered, instructions are proper and sufficient where they contain a brief and concise statement of the rights and duties of the parties, followed by a direction that defendant would not be liable if its performance was rendered reasonably impracticable by plaintiff's failure to receive and properly care for the water after notice to plaintiff that defendant was ready to furnish it, nor if the damage was due wholly to

WATERS AND WATER COURSES—CONTINUED.

plaintiff's acts or failure to care for such water as was furnished; and it was not error to refuse a requested instruction merely amplifying unnecessarily the rights and duties of the parties with reference to the delivery and receipt of the water. *Chute v. Attalia Land Co.* 4

5. WATERS AND WATER COURSES—IRRIGATION—DISTRICTS—ESTABLISHMENT—DESCRIPTIONS—DISCREPANCIES. In proceedings to establish an irrigation district, discrepancies in the description of an exempted tract as contained in the petition and in the notice of the election, do not invalidate the proceedings, where there was no lapse in or uncertainty as to the exterior boundary of the district; especially where the area of the exemption is negligible and will not noticeably affect the tax levy on the remaining lands, since it may be said, as a matter of law, that it did not affect the result of the election. *In re Wenatchee Reclamation District*..... 60

6. WATERS AND WATER COURSES—IRRIGATION DISTRICTS—ESTABLISHMENT—PROCEEDING—NOTICE—DESCRIPTION. Notices for the organization of an irrigation district, required to contain a description of the property to be included in the district, are sufficient where the boundary line is traced through various government corners, the sections, township and range being designated by the use of figures in accordance with the custom in government surveys. *In re Wenatchee Reclamation District*..... 60

7. SAME—IRRIGATION—POWERS OF DISTRICT—PURCHASE OF EXISTING SYSTEM. The purchase of an existing system of irrigation works to be enlarged and reconstructed is authorized as within the spirit of the irrigation act (3 Rem. & Bal. Code, § 6417 *et seq.*), the primary purpose of which was to provide arid lands with an adequate system of irrigation; the powers of the district being general with no express prohibition of such a purchase. *In re Wenatchee Reclamation District* 60

8. SAME—IRRIGATION—DISTRICT—NAME. The designation of an irrigation district as the W. "reclamation" district is authorized by statute requiring the county commissioners to designate a name, without restriction. *In re Wenatchee Reclamation District*.... 60

9. SAME—IRRIGATION—DISTRICTS — ESTABLISHMENT—CONFIRMATION—RECORD. Under 3 Rem. & Bal. Code, § 6417, authorizing a petition for the organization of an irrigation district to be presented at a regular meeting of the board of county commissioners, or at a special meeting ordered to consider the petition, the record need not show whether the meeting was a regular or a special one, in view of the requirement that the court, on proceedings to confirm, must disregard any error, irregularity or omission not affecting substantial rights. *In re Wenatchee Reclamation District*..... 60

10. WATERS AND WATER COURSES—IRRIGATION DISTRICTS—ESTABLISHMENT—CONFIRMATION—REVIEW—RECORD. In a proceeding to "judi-

WATERS AND WATER COURSES—CONTINUED.

cially examine, approve, and confirm" the establishment of an irrigation district, as provided in Rem. & Bal. Code, § 6489, the findings of the county commissioners as to the insufficiency of the water supply and the semi-arid nature of the land cannot be reviewed unless the evidence introduced before the commissioners is preserved and brought before the court. *In re Wenatchee Reclamation District* 60

WAYS:

Private ways of necessity, see EMINENT DOMAIN, 4.
Public ways, see HIGHWAYS.

WILLS:

Witnesses to wills, see WITNESSES, 1.

1. WILLS—RIGHT TO MAKE—STATUTES. The right to make a will is purely a creature of statute and subject to legislative control. *Irwin v. Rogers*..... 284

2. WILLS—NUNCUPATIVE WILL—TITLE TO REALTY — STATUTES. Real estate cannot pass by a nuncupative will, in view of the definite common law meaning of the term, and the fact that Rem. & Bal. Code, § 1330, authorizing nuncupative wills is taken almost verbatim from the statute of wills (29 Chas. II) which was uniformly construed to exclude real estate; especially in view of the general policy of our law to require all contracts conveying real property to be in writing. *Irwin v. Rogers*..... 284

3. WILLS—MENTAL CAPACITY—EVIDENCE—SUFFICIENCY. A finding of testamentary capacity, upon conflicting evidence will be sustained where there was but one witness against the validity of the will, who was contradicted by two attending physicians who acted as attesting witnesses, although the mental condition of the testatrix was doubtful and suspicious and the will was in the sole custody of her husband and chief beneficiary, there being no circumstances preponderating against the finding of the lower court. *Points v. Nier*..... 20

4. WILLS—TESTAMENTARY CAPACITY — EXECUTION—EVIDENCE—SUFFICIENCY. Findings supporting the testamentary capacity and due execution of a will are sustained by a preponderance of the evidence, although there was an appearance of the separation of the sheets and the insertion of another, where the circumstance was fully explained and each sheet was signed at the foot by the testator. *In re Bacon's Estate*..... 1

5. WILLS—EXECUTION AND ATTESTATION—EVIDENCE—SUFFICIENCY. The evidence shows due execution and attestation of a will where it appears that the testatrix, being too feeble to subscribe her name, was assisted in making her mark, stated that she understood it, and the witnesses attested it in her presence and in the presence of each other, upon a request to do so made in her presence; a signature by

WILLS—CONTINUED.

mark being sufficient, and a request being inferred from the circumstances, where another makes the request in her presence. *Points v. Nier* 20

WITNESSES:

Arrest of at trial for perjury, see CRIMINAL LAW, 3.
Admission of testimony given at former trial, see EVIDENCE, 9-12.

1. WITNESSES—PRIVILEGE—WAIVER—PHYSICIANS AS WITNESS TO WILL. The testatrix's attending physician who attests the will is not excluded from testifying as to its execution and the testamentary capacity of the testatrix by Rem. & Bal. Code, § 1214, which provides that a physician shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending his patient which was necessary to enable him to prescribe or act for the patient; as the privilege is waived by requesting the attestation. *Points v. Nier*..... 20

2. WITNESSES — IMPEACHMENT — IMPEACHING OWN WITNESS — CROSS-EXAMINATION—SCOPE. Where cross-examination of a witness for defendant went beyond any legitimate bounds of cross-examination and elicited matters supporting plaintiff's case, not touched upon in direct examination, the plaintiff makes the witness his own as to such matters, and the witness may be impeached by the defendant, upon laying proper foundation, by showing contradictory statements made at other times and places. *Bertschinger v. Campbell*..... 478

3. WITNESSES—IMPEACHING OWN WITNESS—SURPRISE. Where, in a prosecution for seduction of one of previous chaste character, the defense is surprised by the statement of its own witness that he had not had sexual intercourse with the prosecuting witness, the defense should be allowed to interrogate the witness as to former variant statements, and lay the foundation for impeachment by such statements. *State v. Kellogg*..... 665

WORK AND LABOR:

Labor liens on lumber "at the mill," see LOGS AND LOGGING.

WORKMEN'S COMPENSATION ACT:

See MASTER AND SERVANT, 1-9.
Employers within scope of, see COMMERCE.
As violation of due process clause of Federal constitution, see CONSTITUTIONAL LAW.
Instructions as to comparative negligence, see NEGLIGENCE, 7.

WRITINGS:

Parol evidence to vary writings, see EVIDENCE, 5-8.

WRITS:

See CERTIORARI; EXECUTION; MANDAMUS; PROCESS.

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